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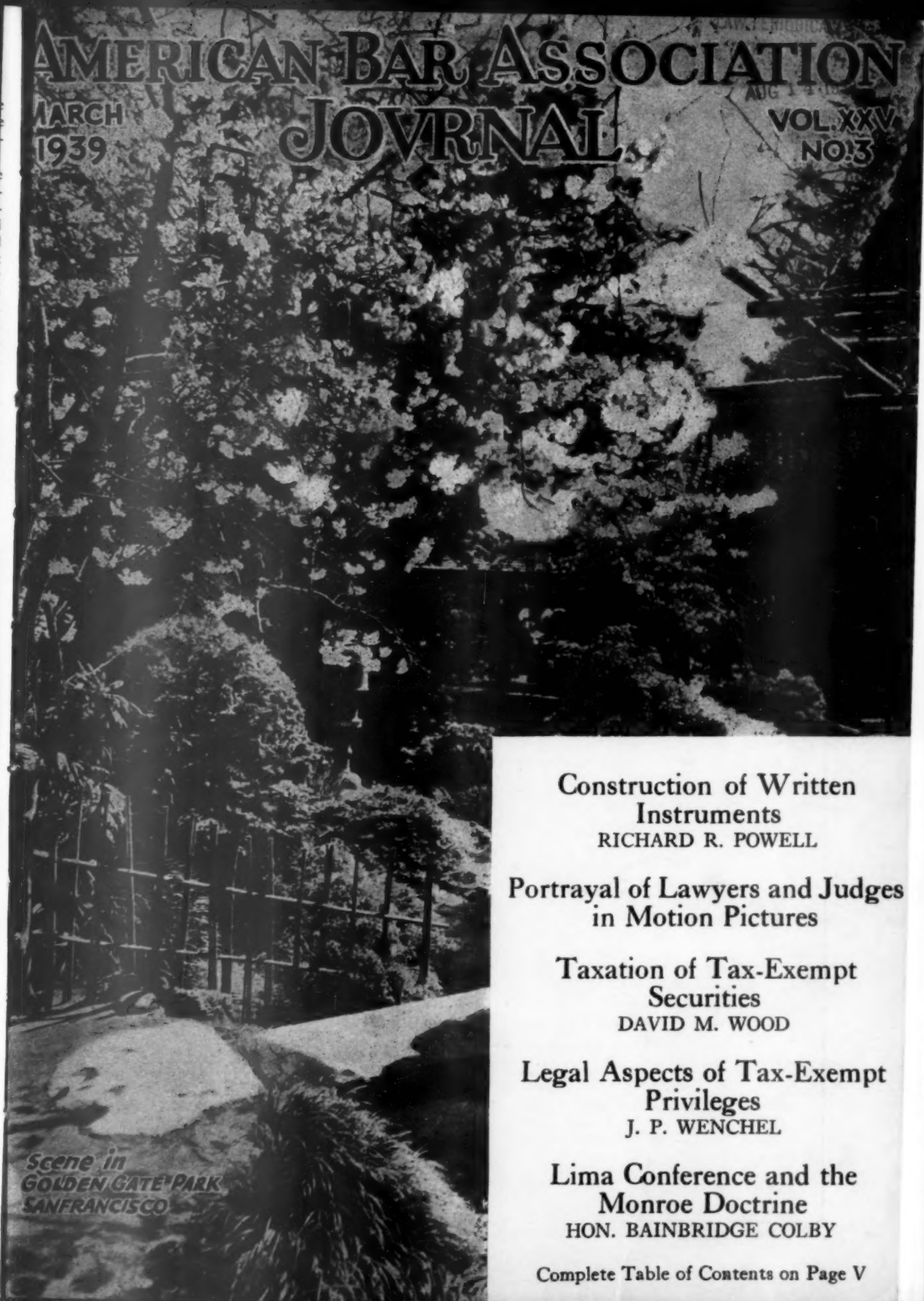

Legal Institutes on the New Rules of Civil Procedure

Two volumes of the proceedings of legal institutes on the subject of the Rules of Civil Procedure for the District Courts of the United States are now available. The Cleveland proceedings contain the rules themselves, the notes of the Advisory Committee, illustrative forms, tables of cross references, bibliography, and comprehensive index. The proceedings of the Washington and the New York Institutes, in one volume, with elimination of material appearing in the Cleveland proceedings, are now available.

These two books published by the American Bar Association contain full discussion of the rules by members of the Advisory Committee which drafted them and by other eminent lawyers, law teachers and jurists. The speakers at these Institutes disclaim any authority to interpret the Rules, but the discussions are illuminative and the answers to questions propounded at the meetings show how most difficulties are removed by reference to applicable rules. The Attorney General of the United States ordered 1,500 copies of each volume and supplied a copy to every federal judge and to the members of the legal staff of the Department of Justice.

SPEAKERS

At the Cleveland Institute

Members of the Advisory Committee:

William D. Mitchell of New York, Chairman
Edgar B. Tolman of Chicago, Secretary
Dean Charles E. Clark of New Haven, Conn., Reporter
Robert G. Dodge of Boston
Prof. Edson R. Sunderland of Ann Arbor, Michigan
Judge George Donworth of Seattle

At the Washington Institute

Members of the Advisory Committee and Other Speakers:

Edgar B. Tolman
Dean Charles E. Clark
Judge George Donworth
Hon. Homer S. Cummings, then Attorney General of the United States
Hon. D. Lawrence Groner, Chief Justice, United States Court of Appeals for the District of Columbia
Hon. Alfred A. Wheat, Chief Justice, District Court of the United States for the District of Columbia
Hon. Oscar R. Luhring, Justice, District Court of the United States for the District of Columbia
Hon. W. Calvin Chesnut, Judge of the United States District Court for the District of Maryland
Prof. William W. Dawson of Western Reserve University Law School

At the New York Institute

Members of the Advisory Committee:

William D. Mitchell
Edgar B. Tolman
Dean Charles E. Clark
Judge George Donworth
Prof. Edson R. Sunderland
Robert G. Dodge

Orders are now being taken by the American Bar Association.

AMERICAN BAR ASSOCIATION
1140 North Dearborn, Chicago, Illinois

Please send me immediately; postage prepaid: a copy of the Proceedings of the Cleveland Institute on the Federal Rules, for which I am enclosing (money order) (check) for $3.00 ☐ **check here**

a copy of the Proceedings of the Washington-New York Institute on the Federal Rules, for which I am enclosing (money order) (check) for $2.00 ☐ **check here**

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CURRENT EVENTS

Committee on Bill of Rights Submits Brief to Supreme Court

THE Committee on the Bill of Rights of the American Bar Association on February 27 submitted a brief as friends of the Court in the Supreme Court of the United States upon the review by the Supreme Court of the recent decision of the Circuit Court of Appeals for the Third Circuit against Mayor Hague and other officials of Jersey City. Argument was had on the case the same day.

Last autumn, Federal Judge William Clark, as District Judge, made a decree enjoining Mayor Hague and other officials from violating the constitutional rights of the C. I. O. and American Civil Liberties Union. This decree was affirmed and enlarged by the Circuit Court of Appeals in a decision in January, 1939. The Committee filed a brief as amicus curiae in the Circuit Court of Appeals. On February 6, 1939, the Supreme Court of the United States granted a review and set February 27 for argument.

The new brief of the Committee deals entirely with the constitutional right of assembly. The brief follows in the main the brief filed by the Committee in the Circuit Court of Appeals, but also deals with new questions raised by the opinion of that Court.

The brief stresses the point that the denial of the permits for public meetings to the C.I.O. and American Civil Liberties Union was clearly based on the ground that these organizations and their speakers were not acceptable to the authorities of Jersey City. It denounces this ground as a proper basis for the suppression of meetings. The brief declares (p. 6): "If it should ever come about that the law countenances the suppression of free speech on the basis of the inacceptability to the prevailing majority opinion of the speakers or their sentiments, the very basis of the doctrines on which our institutions are built would be destroyed."

The brief points out that the other unconstitutional standard adopted by the authorities of Jersey City was that of claiming the right to suppress the meetings because disorder was threatened.

On this point, the brief states (p. 20) that the denial of permits for meetings merely on the ground that disorder is threatened "would place the rights of free speech and assembly in open-air meetings at the mercy of any faction even though a small one," and says (p. 21): "Surely a speaker ought not to be suppressed because his opponents propose to use violence. It is they who should suffer for their lawlessness, not he. Let the threateners be arrested for assaults, or at least put under bonds to keep the peace."

Discussing the question of a city's obligation to provide adequate facilities for open-air meetings (pp. 29-32), the brief stresses the principle that, in view of the importance of out-door meetings as a medium of public discussion, a city must in some adequate manner provide facilities for public meetings. It points out, however, that conditions may differ in various cities with relation to the availability of adequate meeting places in streets and parks. It advances the thought (p. 31) that it may be advisable to establish a number of open-air forums exclusively reserved for public discussion similar to the portion of Hyde Park in London set aside for this purpose. Under this head, the brief states (p. 31): "It may well develop that the most feasible solution of this problem in many cities will be the establishment of 'Hyde Parks' of sufficient number and so located as to provide effectively for free outdoor public discussion."

The brief refers (p. 41) to the denial of the right of assembly in Jersey City as "essentially a manifestation of intolerance." It characterizes (p. 3) the course of conduct of the officials of Jersey City as a serious abridgement of the constitutional right of free assembly "of so deliberate and important a character as to be of national consequence." In conclusion, the brief (p. 42) contains the following: "The Committee submits that the case calls for a decree that will enjoin the continuance of the arbitrary acts of the defendants and afford full and effective protection to the constitutional right of assembly."

The Committee on the Bill of Rights was appointed under a resolution of the House of Delegates of the American Bar Association at its convention last summer. Its general function is to protect the fundamental rights and immunities guaranteed by the Bill of Rights.

Entire Navy's Strength May Be at San Francisco During Meeting

THERE is every prospect that when the Annual Meeting of the American Bar Association is held in San Francisco next July, the entire Fleet of the United States will be at anchor in San Francisco Bay.

Presently undeveloped naval considerations may of course change what is understood to be the tentative program for the Fleet's movements during the next half year, but there is excellent ground for believing that the American Navy's strength, represented by battleships, cruisers, destroyers, submarines, airplane carriers, hospital ships, and all other vessels which go to make up the entire Fleet, will be there.

If, as is now hoped and expected, the Fleet arrives in San Francisco Harbor July 10th and remains until a date later than July 15th, our members will have an opportunity to enjoy one of the most striking marine sights any one could witness. In the night time when the great Fleet, representing the Nation's naval strength, plays its searchlights on sister ships, surrounding waters, and the nearby coasts, the spectacle presented will be unforgettable.

As we go to press it is not possible to obtain definite official confirmation that the Fleet will be assigned to San Francisco Harbor during the first half of next July, but from unofficial sources come indications that this will be done.

W. P. A. Lawyer Projects Praised in New Jersey

A RECENT Committee report to the New Jersey State Bar Association declared that no activity of that Association had ever contributed more to the welfare or morale of the bar than have the Works Progress Administration Lawyers' projects. Projects initiated by the committee have extended over 21 months. The amount contributed by the Association amounted to only $1,500 while the amount disbursed to needy lawyers amounted to some $250,000.

The report points out that the projects have provided 9,743 man-weeks of employment, at a cost to the Association of a little over 15 cents a week for each attorney employed, and that there has been $165 in salary benefit for each dollar contributed by the bar.

Annotations for the Workmen's Compensation Act have been completed and the annotating of other statutes and of some of the restatements is in progress, the committe says. Another project approved and ready to be started is a survey of the legal profession in New Jersey. This will be in line with the recommendations of the American Bar Association's Committee on Professional Economics which has urged local surveys in various States and cities to get the facts regarding such questions as overcrowding, earnings of lawyers, amount of legal business available, and the possibilities of developing new fields for legal service.

"Heir-Chasing" Practice Attacked in California and Chicago

IN California attorneys are much interested in a bill prepared for introduction into the legislature by the County Board of Supervisors of Los Angeles County that is aimed at the heir-chasing racket. The proposal would prohibit publication by the probate division of the county clerk's office of names of heirs to estates for at least ninety days after the petition for probate has been filed. In the interim, notice would be sent to the heirs by the court.

According to the State Bar and other sources, principal abuse in the heir-chasing field now arises from the fact that operatives for this racket consult the county clerk's files between 4 and 5 p. m. each day, learn the names and addresses of prospective heirs, ascertain if possible the potential amount, and before the next morning either have effected or are on the way to effecting a contact or contract.

The principal objection has been that the heir chasers, practically all of whom are laymen, enter into contracts with prospective heirs for a portion of the sums to which they are legally entitled. These contracts commonly call for a 50 percent split, and rarely ask less than one-third of the entire sum bequeathed.

The victims are usually heirs who reside in foreign states or countries. There is no doubt, it is said, that some improvement could be made in the giving of notice to them, but there is also little doubt that a law prohibiting any person from seeing public records, unless grounded on some especially pernicious abuse, would be unconstitutional.

Heir chasers legally could be prosecuted, but lawyers maintain that an act prohibiting access to public records will probably be held to be unconstitutional.

In Chicago, the Committee on Unauthorized Practice of Law of the Chicago Bar Association, with the approval of the Probate Judge, John F. O'Connell, has announced that the activities of lay agencies engaging in the business of searching for unknown and missing heirs must be kept within certain defined limits.

Washington Letter

Mr. Justice Brandeis Retires

A WEALTH of judicial history is called to mind by this two line letter which was transmitted in Washington February 13, 1939:

"Dear Mr. President:

"Pursuant to the act of March 1, 1937, I retire this day from regular active service on the bench.

"Cordially, LOUIS D. BRANDEIS."

Some of the more important fields of the law and social legislation in which he participated were these: He defended the early efforts of the States to regulate the hours of women in industry; and advocated legislation designed to better the conditions of the American working man. Utility and rail regulation often demanded his attention and he had a part in bringing down the gas rates in Boston. At times he emphasized his belief in the principles of the Bill of Rights. He forced a reduction of premiums on industrial life insurance. He was continuously in favor of sustaining the 18th Amendment and the Volstead Enforcement Act, taking the position that the Government, if it chose, might legitimately rule men's morals within certain limited fields.

In a dissenting opinion—when, in 1932, the Court invalidated a statute whereby Oklahoma sought to regulate competition in the ice industry through a licensing system—Justice Brandeis said: "It is one of the happy incidents of the Federal system that a single courageous State may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country."

It is reported that Justice Brandeis's intense interest in the problems between labor and industry was aroused by the battle at Homestead, Pennsylvania, in 1892, when striking steel workers were shot down by hired guards at the plant. And he is quoted as having said that "it took the shock of that battle, where organized capital hired a private army to shoot at organized labor for resisting an arbitrary cut in wages, to turn my mind definitely toward a searching study of the relations of labor and industry."

It is apparent that Justice Brandeis does not hold the view that all strikes are lawful or that all methods which may be used in strikes are permissible. This is shown in a unanimous opinion of the Supreme Court which he wrote in a case decided October 25, 1926. A labor union's officer named Dorchy had been prosecuted and convicted in a jury trial under a provision of State law making it a felony for such officer wilfully to use the power or influence incident to his office to induce another person to violate any provision of the Act. One such provision made it unlawful to conspire "to induce others to quit their employment for the purpose and with the intent to hinder, delay, limit or suspend the operation of" mining. In its opinion, the Supreme Court, through Justice Brandeis, said:

"The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid argument to the contrary, each party to a disputed claim may insist that it be determined only by a court. Compare [citing 2 cases]. To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally as extortion or otherwise. Compare [citing 1 N. Y. case]. And it may subject to punishment him who uses the

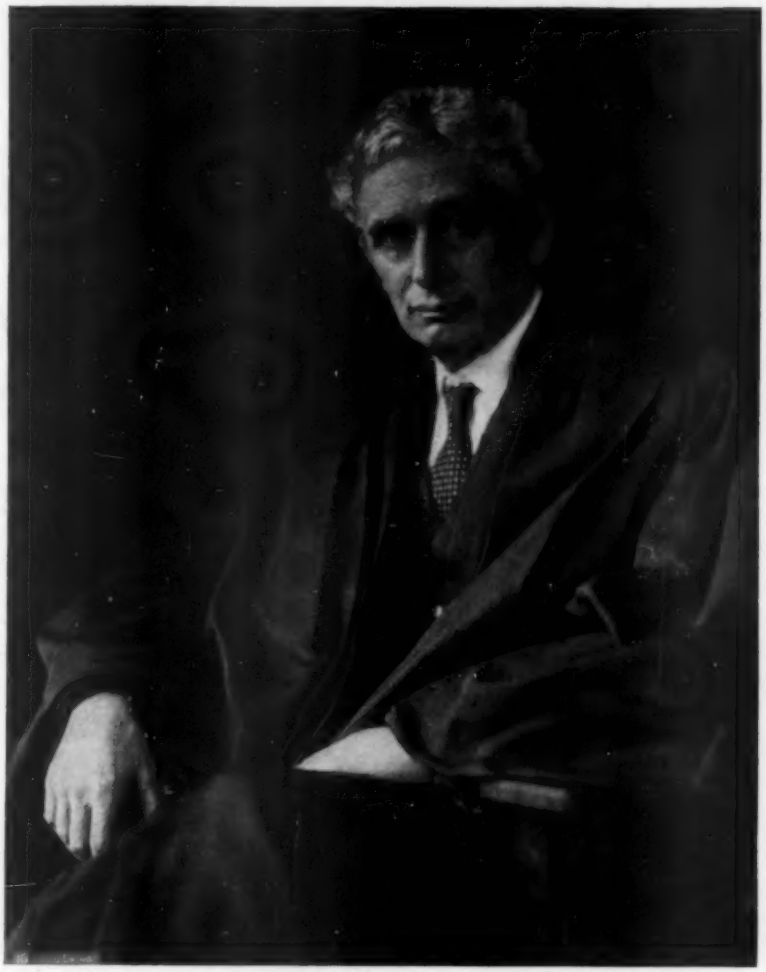
power or influence incident to his office in a union to order the strike. Neither the common law nor the fourteenth amendment confers the absolute right to strike. Compare [citing 1 case]." Dorchy v. Kansas, 272 U. S. 306, 311, 47 S. Ct. 86.

Personal tributes were paid Mr. Justice Brandeis by several Senators, on the floor of the Senate, following his retirement. Among Senator Barkley's remarks were these statements: "He pursued in early life a course the reverse of that ordinarily pursued by young men in the East and in the Middle West. Instead of going west he went east. He was born in Kentucky. He was partly educated there. Finally he became a citizen of Massachusetts." The Senator referred to his appearance, in 1914, before a subcommittee of the House in advocacy of certain legislation, which had been pending in one form or another in Congress for more than a quarter of a century, and then continued: "I did not agree with him as to the wisdom of the legislation, but I soon discovered by his manner of presentation that he had as intellectual a mind and as logical an approach to a given subject as any public man it had ever been my privilege to observe."

Senator Barkley recalled the contest over the confirmation of Justice Brandeis, in 1916, and said: ". . . that contest, it seems to me, may afford us a lesson, even in our time, that, however much we may attempt to suppress honest thought and honest expression, we may not only find ourselves unable to do so, but we may find it extremely unwise to make the attempt. Mr. Justice Brandeis has had a wholesome and refreshing influence on the Supreme Court. During most of his adult life he has had a similar influence upon discussions of public questions throughout the Nation. He will take his place with Marshall, with Story, with Taney, and with Holmes as an outstanding member of the Supreme Court."

Senator Walsh, of Massachusetts, referred to Justice Brandeis as bringing to a close "23 years of arduous, conscientious, and distinguished public service as a member of the Court," and continued, "Both Holmes and Brandeis, of such contrasting antecedents and early environment, were alike in their liberalism—a liberalism of a kind that was ever consonant with liberty and with the fundamental concepts of democracy. They were alike in their fidelity to their ideals, in their fidelity to the Constitution, in their moral courage, and in their consciousness of the responsibilities of the courts and the law as instruments of justice and social progress."

Senator Henry C. Lodge, Jr., also of Massachusetts, in speaking of Mr. Justice Brandeis, said, "Even before his appointment to the Supreme Court he had a record of achievement which few men could equal. He had already made himself known as a vital, aggressive fighter for justice, and as a man who was willing to give the great output of his brain and his character for improving the lot of his fellow men. Since he has been on the Supreme Court he has shown a passion for justice, and those attributes of kindness and generosity which are the only qualities that will make possible the survival of democracy. It is a wonderful thing to contemplate a man the force of whose emotions is equaled by the power of his intellect."



ASSOCIATE JUSTICE LOUIS D. BRANDEIS

Administrative Law Developments

S. 915, to provide for the more expeditious settlement of disputes with the United States, has been referred to a subcommittee of the Senate Judiciary Committee, which subcommittee is composed of Senators M. M. Logan, of Kentucky, Chairman, William H. King, of Utah, Edward R. Burke, of Nebraska, George W. Norris, of Nebraska, and Warren R. Austin, of Vermont. No report is imminent at this time and no hearings have been scheduled as yet.

This is the bill discussed and set forth in the Report of the Administrative Law Committee in last month's issue of the Journal. Vol. XXV A. B. A. Journal pp. 113, 116. The import of the bill is indicated by some of its section headings such as the following: Implementing Administrative Rules, Judicial Review of Rules, Statutory Approval and Authority for Administrative Boards and Prescribing Their Procedure, and Judicial Review of Decisions or Orders of Administrative Agences. The bill was introduced by Senator Logan.

There was also introduced by Senator Logan and referred to the same subcommittee, S. 916, to establish a United States Court of Appeals for Administration aid to receive, decide, and

(*Continued on page* 260)

CONSTRUCTION OF WRITTEN INSTRUMENTS

One of the Oldest Processes of Human Life—Recent Great Increase of Litigation Centering on Statutory Construction—Three Steps in the Process—Principal Types of Instruments Which Trouble the Lawyer as to Their Construction—Essential Differences between Them to Be Considered in the Process—Points around which Present Discussion Centers—Requirement That Instrument Be Read as an Entirety—Utilization of Material Extrinsic to Will or Inter Vivos Declaration of Trust—Utilization of Facts Extrinsic to Statute—Problems of Construction Involving Future Interests*

By Richard R. Powell

Professor of Law, Columbia University; Reporter on Property, American Law Institute

THE construction of written instruments is one of the oldest processes in human life. It has constituted a major activity of those learned in religion, in literature and in law. As lawyers much of the time which we do not spend in construing the works of others we devote to the drafting of instruments which will require construction by others. The recent increase in the volume of our statutory law has greatly increased the quantity of litigation centering on statutory construction. In the past forty years this type of litigation has increased nearly sixfold.

The process of construction includes three steps. First it is necessary to search for as close an approximation as can be obtained to the idea sought to be embodied in the separate paragraphs, sentences, phrases or words in the document under scrutiny. Secondly these separate ingredients must be fitted together into an harmonious whole. Lastly this whole must be read in the light of the substantive law as to effectiveness for from this law frequently comes guidance in ascertaining the meaning intended by the person whose language is to be construed.

Written instruments which trouble the lawyer as to their construction are of nine principal types, namely, wills, inter vivos declarations of trust, inter vivos conveyances not involving a trust, contracts, state statutes, Federal statutes, state constitutions, the Federal constitution and treaties of the United States. So divergent types of instruments present widely variant problems. Hence it is essential to have their differences well in mind when we draw generalizations concerning their construction.

Constitutions, statutes and treaties are public in character and the future effects of a construction of such an instrument are likely to be more important than the immediate outcome of the litigation in which the construction is made. This requires that such a construction be made in a fashion consonant with the intended permanence and the contemplated generality of application of the rule which is reached. All of these public instruments are alike in that they are formulated and worded by a group other than the group whose act makes them binding. Thus a constitution, whether state or Federal, is formulated commonly by a convention called for that purpose; statutes are typically the products of a legislative committee or even of one or two members of such a committee; while treaties are negotiated and worded by the gentlemen in the Department of State. This division between authorship and enactment is an element which makes the search for the "legislative intent" so often fruitless. Despite these similarities, statutes and constitutions have a difference which is of major importance. A statute commonly is designed to accomplish some rather immediate end within a relatively restricted field of operation. Furthermore the enacting body meets with recurrent regularity and can correct discovered inadequacies of a prior statute. Constitutions on the contrary establish general outlines of a frame of government and are not subject to ready modification. Hence the construction of a constitution requires a liberality of approach not so necessarily present in the handling of a like problem with respect to a statute.

Private instruments fall into two sharply distinguishable categories. A will or inter vivos declaration of trust is typically a voluntary, unpaid-for distribution of his wealth by a conveyor. Hence the subjective purpose of the conveyor deserves great emphasis in the process of construction. Of course, the lawyer, as the interposed word-man, makes it necessary sometimes to query the accuracy of the instrument as a recordation of the mind of the conveyor. Contracts and inter vivos conveyances not involving a trust usually embody the results of negotiations had and a bargain reached between two or more persons. This injects the necessity for objectively viewing the words employed and of considering not only the ideas from which the words proceeded but also the ideas and expectations which these words reasonably aroused in the person to whom they were addressed.

Hence in the balance of this material we must ever be alert to note whether some one of these essential differences between the types of instruments involved

*This article consists of a condensation of the substance of lectures delivered on November 16 to 18, 1938, before the Bar Association of the City of Indianapolis. The full text of these lectures is to be printed in the Indiana Law Journal during the Spring of 1939. The process of condensation has required the elimination of all discussion of the facts of specific cases and of most of the data adduced in support of the statements made. The detailed discussions of the law of Indiana and of the mechanics of the operation of the American Law Institute have also been greatly cut.

vitiates the soundness of an attempted generalization. The construction of an instrument is, and should be, determined in part by the public or private character of the instrument, by the degree of permanence and breadth of applicability contemplated for it and by the donative or paid-for character of the disposition made thereby.

Limitations of time and space dictate the necessity for treating herein chiefly of instruments which are either statutes or donative dispositions of property, such as a will. The discussion will center about four foci: first, the acceptance and the significance of the requirement of reading an instrument as an entirety, rather than seriatim, by clauses; second, the extent to which the meaning of a will or other similar conveyance can be found by a resort to facts intrinsic to its text; third, the extent to which facts extrinsic to the text of a statute can be proved and used in the construction of the statute; fourth and lastly, the diagnosis and resolution of those problems of construction which are most frequently litigated as to future interests.

I.

The requirement that the written instrument be read as an entirety, rather than seriatim, by clauses.

In the construing of statutes the courts of the State of Indiana have been most emphatic upon the necessity of reading each part of the statute in the light of the whole into which that part fits.

The Gross Income Tax Statute of 1933 (c. 50) provided for differing rates of tax applicable to differing occupations and considerable litigation ensued as to the proper bracket applicable to a taxpayer. Some occupations seemed to be within the literal provisions of two brackets. Reading the statute as a whole the court properly found that the apparent inclusiveness of one clause was to be cut down so as to permit a reasonable efficacy to a later clause [Treasury v. Ridgely, 211 Ind. 9 (1937)]. These difficulties in this statute have now been removed by amendment (Laws of 1937, c. 117) but the policy of statutory construction evolved in these cases remains as a valuable basis for future decisions.

In the same year of 1933 the Legislature of Indiana enacted a tax on intangibles (Laws of 1933, c. 81). One factor in the sustaining of the constitutionality of this tax was found in the statute's own declaration of its character as a tax on the exercise of a privilege [Lutz v. Arnold, 208 Ind. 480, at 489-491, 500 (1935)]. The validity of the statute was further challenged on the ground that it made arbitrary exclusions from its operation in that it did not apply to banks, trust companies, building and loan companies and other like corporations. The court pointed out that this statute was but one part of a new and complete system of taxation and that the other statutes enacted at the same session of the legislature were in pari materia and were all to be read as a part of one whole. Thus read the exclusions made by this one statute ceased to be arbitrary. Herein we see an extension of the doctrine of reading a single statute as an entirety. Not only must that be done, but we must go further and read this statute as one unit in the series of separate statutes constituting the execution of one general but integrated program.

This same statute, levying a tax on intangibles was before the Supreme Court of Indiana again in Zoercher v. Ind. Assoc. Telep. Corp., 211 Ind. 447 (1937). In this case the intent of the legislature as discovered from the entire statute was held to justify a departure from the "strict letter of the statute" in one of its clauses.

In these cases on statutory construction the courts indulged in no close inspection of the statute, clause by clause, in an effort to find inconsistency between successive provisions. Rather the separate parts were considered together so as to attain a workable and coherent whole.

Have the courts of Indiana been similarly wise in the handling of written instruments of a private character? Sindlinger v. Department of Financial Institutions [210 Ind. 83 (1936)] involved the contract made by a bank with its depositors in its Savings Department. Separate clauses in the agreement had to be brought into harmony with the spirit of the whole and this the court did with wisdom and without hesitation. When, however, we turn to the Indiana decisions on conveyances of land we find quite a different practice. In Snodgrass v. Brandenburg [164 Ind. 59 (1905)] the court read the first sentence of the will in question, drew a conclusion as to the extent of the interest created by that sentence alone and *then* read on to see whether its *already drawn conclusion* was inconsistent with what appeared in later clauses. This illustrates the unfortunate practice sometimes encountered, in which the court reads the clauses of an instrument seriatim instead of as an entirety, and thus indulges in piece-meal construction. The example thus set by the highest court of the state has led to some highly lamentable results in the lower courts of Indiana. [Hume v. McHaffie, 40 Ind. App. 703 (1907); Ewart v. Ewart, 70 Ind. App. 167 (1919)].

The supposed repugnancy between the earlier and later clauses of the instrument does not exist until the court decides to pause for rest and to draw a conclusion before the whole instrument has been read as an entirety. In other words the repugnancy is a product of the court's disregard of its own generally accepted rule of construction, namely, to read the instrument as a coherent whole. The law of Indiana would become more symmetrical and the results reached would be better effectuations of the intents of conveyors if, in this particular, the rules of construction accepted in this state as to statutes and contracts were also applied to conveyances. It is reasonable to infer that in a statute, contract or conveyance each sentence or paragraph was intended to be read with such modification or qualification as is made necessary by any other sentence or paragraph in the same instrument. To accept this rule as to some instruments and to deny it as to others is an irrationality with which a state can afford to dispense.

II.

The utilization of materials extrinsic to a will or to a voluntary inter vivos declaration of trust in the ascertainment of meaning.

Frequently a thorough exploration of all that can be found within the four corners of an instrument leaves one unclear as to the proper interpretation thereof. Frequently, also, that which appears perfectly clear on a mere reading of its words becomes quite different in meaning when read from the arm chair of the conveyor. To what extent can resort be had to the circumstances of the formulation of the instrument?

The courts of Indiana have resorted to facts extrinsic to the instrument in many cases. [Hertford v. Harned, 185 Ind. 213 (1916); Clark v. Allen, 189 Ind. 601 (1920); Haines v. Indiana Trust Co., 75 Ind.

App. 651 (1921); Mudhenk v. Bierie, 81 Ind. App. 85 (1922); Rodarmel v. Gwinnup, 92 Ind. App. 684 (1931)]. A careful examination of these cases leaves one a bit unclear as to what must be established before such resort can be had. It is admitted everywhere that such resort is proper when the text reveals a latent (rather than a patent) ambiguity. But in several of these cases, the ambiguity was not discovered until after the extrinsic facts had been found out and examined. Nevertheless the courts reiterate the declaration that "extrinsic evidence cannot be received to vary the terms or provisions of a will where there is no ambiguity." How can a lawyer know whether the requisite ambiguity exists? Must he wait until a court affirms its existence? Will the court "peek" behind the language into the circumstances in every case, and having done so, emerge *sometimes* with the conclusion that there is an ambiguity so we all may join in the "peeking," and *sometimes* with the conclusion that none but the court may "peek"? This latter seems to be the present state of the law as nearly as one can derive it from the decisions of Indiana. The unsatisfactoriness of such a state of affairs is apparent.

The reluctance of courts to resort to extrinsic evidence for the clarification of a patent ambiguity has been condemned by Wigmore [§§2461, 2472 ff.], Schouler [§1926] and Page [§1419], has been repudiated in many states of this Union and serves no purpose save to inject a distinction which increases the necessity for mental gymnastics by the judge anxious to decide cases in accordance with his conscience. Similarly the rule which forbids resort to extrinsic facts when the text of an instrument reveals a "plain meaning," is a rule which loses its persuasiveness in proportion as one examines its effects. The position of Mr. Justice Holmes in Towne v. Eisner [245 U. S. 418 (1918)] is most true. He said:

> "A word is not a crystal, transparent and unchanged. It is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used."

The Restatement of the Law of Property [Tent. Dr. No. 7 §241] takes the position that words can only be understood as they were meant when the hearer knows fully the atmosphere in which the instrument took its form. This represents the prevailing law in this country. Hence a state is acting in accord with both the prevailing and the most desirable rule when it is extremely liberal in allowing the reception of evidence calculated to give the court an awareness of what the conveyor did mean by the words he has written. This involves no denial of the policy of the statute which requires that a will be written. It merely insists that the reader of the writing to be construed shall bring to its reading the best possible equipment enabling him to recapture from the written words the ideas which the writer had at their selection. No clogging of the processes of justice will result from such an attitude. The experiences of the states already accepting this attitude rebut any such fear. In the ordinary case there will be no facts, which, if produced, would affect the rights of any party. Whenever any one believes he has facts showing that the written word is an awkward or an incomplete expression he should be privileged to present these facts, without requiring him first to get these facts before the court in some surreptitious manner so as to make the court recognize the existence of that phantom, an ambiguity.

III.

The utilization of facts extrinsic to the text of a statute in determining its meaning.

Statutes present the same general problem as we have been considering in connection with conveyances. Under what circumstances and to what extent can we resort to facts extrinsic to the text of the statute for the purpose of construing the statute? Perhaps the best approach to a solution of this problem is through a brief consideration of the theoretical background of statutory construction. Just as equity remedied the crystallized inadequacies of the strict common law, so statutes, during the past century, and particularly during the past few decades, have been the medium for making the adaptations made necessary by a rapidly changing society.

The present day abundance of statutes is rapidly transforming our courts into agencies for the application and administration of the legislative precept. In Gray's Nature and Sources of the Law, published in 1924, the author sought to minimize the change from judge developed law by asserting that statutes are meaningless unless and until construed and applied by a court. Professor Radin of the University of California in an article written in 1930 [43 Harv. L. Rev. 863-885] went still further. He not only denied the importance of statutes and attributed transcendent importance to judges but he adopted frankly the theory sometimes described as "visceral construction," urging that judges merely construe statutes in accordance with their inner urges, and that not only is there no search for the "intent of the legislature," but that there is no such intent which could be found if diligently sought. This viewpoint has been vigorously combatted by Dean Landis of Harvard [43 Harv. L. Rev. 886-893]. He believes that the legislative viewpoint is more likely to approach the best present knowledge on a subject than the more backward looking attitude of judges, and that statutory construction is a process in which the legislative purpose is frequently discoverable by proper resort to facts extrinsic to the text of the statute. Upon this approach the construction of a statute resembles the construction of a will in that it is a search for *the idea* sought to be expressed in the language of the instrument. Frequently the origin and content of this idea must be pursued through the Legislative Halls back into Committee rooms or into petitions, public activities and situations generating the movement of which the statute is merely a culmination. Thus viewed, statutory construction is a process in which widespread resort to facts extrinsic to the statute's text is both proper and unavoidable.

In the active practice of the law, members of the profession perform frequent and difficult tasks with respect to our statutes. The daily life of a business man is touched at many points by legislation both national and state. Whenever legislation of a new type occurs there is a period of months—sometimes even lengthening into one or two years—during which there are no decisive judicial constructions of the statute's applicabilities and effects. This is a period in which the lawyer has the heavy responsibility of guiding his client through the dangers of an uncharted channel. In the effort accurately to predict the ultimate judicial construction of a statute the lawyer must be prepared to do quickly for himself, that which characterizes a court's behavior when required to construe the same statute. This requires readiness in getting at the relevant facts extrinsic to the text of such statute. A priori

reasoning based solely on the text of a statute is apt to be costly to the client who relies thereon.

In considering the existing authorities upon the topic it is convenient to discuss first, the English attitude with respect to Acts of Parliament; second, the Federal authorities with respect to Congressional legislation; and lastly, the behavior of State courts with respect to the enactments of their own legislatures.

In the early centuries of Parliament the judges frequently drafted the statutes and being well acquainted with the embryology of statutes were quite ready to recognize that the word of a statute should yield for the accomplishment of its purpose [see Auymeye v. Anon, Y.B. 33 & 35 Edw. I 82; Note by Plowden to Eyston v. Studd, Plow. Rep. 465 (1574)]. With the passage of the centuries the English common law developed a "mystical awe" for the written instrument and this has resulted in close adherence to the exact words of a statute even when such adherence is recognized as defeating the purposes for which the statute was enacted [Gray v. Pearson, 6 H.L. Cases 61 at 106 (1857)]. This process has been carried to such an extreme that Sir James Stephen thus described the task of one who undertakes to draft an Act of Parliament [1891], 1 Q.B. 149 at 167:

> "It is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand."

The resultant truncated state of the process of statutory construction in England is made tolerable in effects only by the very real skill heretofore exhibited by the drafters of Acts of Parliament. This skill renders it less often necessary than with us, to go behind the wording of a statute for the ascertainment of its meaning.

The contrast between the attitudes thus expressed in England and those which have gradually gained acceptance in the Federal Courts of this country with respect to the Constitution of the United States and Congressional legislation, is very striking. Material extrinsic to the text of a statute found its earliest employment when it served to corroborate the constructional conclusions reached on the basis of the words found in the statute [Martin v. Hunter's Lessee, 1 Wheat. 304 at 350 (1816)]. Three years later Chief Justice Marshall recognized the propriety of resort to extrinsic material in two types of cases, first, where doubt as to meaning is raised by an internal conflict of language, and second, when doubt is raised by "monstrous absurdity" in what seems to be said by the language of the instrument [Sturges v. Crowninshield, 4 Wheat. 122 at 202 (1819)]. The position thus announced by the Chief Justice is much more restricted than that accepted in recent decisions of the Supreme Court, but it represented a highly liberal rule at the time of its formulation. In fact many State courts still restrict resort to extrinsic aids in the construction of State constitutions and legislation to cases within these two categories.

The route by which a broader rule has evolved can be described as the gradually expanding content of "contextual construction." Granting that any statutory language should be read in its "context," it becomes quite easy to expand the term "context" so that it includes not only the *words* found in this statute, but also the words found in related statutes and, finally, the broader facts of the statute's background.

The period of liberalization began in the Supreme Court with Church of the Holy Trinity v. U. S. [143 U. S. 457 (1892)]. In this case a statute which forbade the importation of any "alien to perform labor or services of any kind in the United States" was held to forbid only the importation of *manual* labor. This restriction upon the scope of the statute's prohibition was justified by an examination of the "situation" out of which the statute evolved and by the clear statements to that effect found in the report of the Senate Committee on Education and Labor.

Space does not permit the detailed tracing of the devious course of this process of liberalization in the ensuing forty-seven years. Such a tracing would require careful examination of the facts and holdings in at least ten cases [Trans-Missouri Freight Assoc. Case, 166 U. S. 290 (1897); Hamilton v. Rathbone, 175 U. S. 414 (1899); Johnson v. Southern Pacific Co., 196 U. S. 1 (1904); Caminetti v. U. S., 242 U. S. 470 (1917); Duplex Printing Press v. Deering, 254 U. S. 443 (1920); Nielsen v. Johnson, 279 U. S. 47 (1929); Popovici v. Agler, 280 U. S. 379 (1930); McBoyle v. U. S., 283 U. S. 25 (1931); Smiley v. Holm, 285 U. S. 355 (1932); and Williams v. U. S., 289 U. S. 553 (1933)]. All of the above cases deal with resort to matters which are extrinsic to the text of the provision to be construed and which occurred *before* the enactment of the statute. There is another and distinct type of case in which the process of construction is aided by resort to events which are extrinsic to the text and which occur *after* the enactment of the statute. I refer to those cases sometimes described as involving "practical construction," and sometimes referred to as instances of "contemporaneous exposition." In these cases, as in those hereinbefore referred to, resort was first permitted to extrinsic data only after the court had found in the text an ambiguity requiring resolution [U. S. v. Pugh, 99 U. S. 265 (1878)]. Among the decisions of 1892, however, we find a case in which evidence of this sort caused departure from the literal and unambiguous language of a statute fixing the compensation of railroads for the carrying of mails [U. S. v. Alabama R. R. Co., 142 U. S. 615]. The later developments of this doctrine can be observed in U. S. v. Hermanos y Compania, 209 U. S. 337 (1907); Iselin v. U. S., 270 U. S. 245 (1926) and U. S. v. Shreveport Grain and Elevator Co., 287 U. S. 77 (1932).

What is the net conclusion which one can reasonably derive from the Supreme Court cases to which reference herein has been made?

It is clear that, in a proper case (and I shall indicate what constitutes a proper case in a moment), resort can be had to any one of six types of material, extrinsic to the instrument in question. The *situation* to meet which the statute was enacted can be proved. The *legislative history*, consisting of all changes in its wording from introduction to enactment and including at times statutes in pari materia, can be established. The *report of the committee* or commission which drafted the bill originally, whether this body be a legislative committee or one specially constituted by law for the purpose, is relevant as to the "idea" sought to be embodied in the bill. Other *reports* of committees of the legislature, made in the course of its consideration and *statements* of persons charged with steering the legislation through either house can properly be

examined. Lastly, the *practical constructions* placed upon the statute by executive officers administering its provisions, including opinions of the Attorney-General as to its meaning have much of value for the Court faced with the problem of construction. Truly our Federal Courts have gone very far in their sincere and capable effort to make legislation accomplish the ends envisaged by those who framed its language.

But we have left open "what constitutes a proper case" for this extensive resort to material extrinsic to the text. Clearly such resort is proper in two situations, namely, those covered by Chief Justice Marshall's summary of more than a century ago, where doubt arises from internal conflict in the language of the instrument, or where a literal reading of the statute brings the reader to a "monstrous absurdity." I submit that gradually we have come to recognize the impracticability of the "plain meaning rule" and that, therefore, these resorts to extrinsic evidence are proper in substantially *every* case; that such resort can be had not only to show the proper resolution of an ambiguity otherwise and first established, but also to show the existence of an ambiguity and then to resolve the ambiguity so revealed. This constitutes a complete repudiation of the "clear meaning rule." It is a sensible position designed to enable the courts to perform properly their function of giving effect to legislative action in accord with the motivations of that legislation in so far as such motivations can be ascertained.

Having observed the totally different approaches and the sharp contrast between the processes of statutory construction as they exist in England as to Acts of Parliament and in the United States, with regard to Federal statutes and the Federal Constitution it now becomes necessary to come closer home and to examine the similar problems as they have found treatment in our State courts with respect to State legislation.

In the decisions of the State of Indiana I have found little indication that the rule of construction has gone beyond the rule formulated by Chief Justice Marshall for the Federal Courts in 1819 [see above as to Sturges v. Crowninshield, 4 Wheat. 122 at 202 (1819)]. The most illuminating Indiana decisions since 1933 upon this point are the following nine cases: Snider v. State, 206 Ind. 474 (1934); Cotton v. Commonwealth Loan Co., 206 Ind. 626 (1934); Board of Com's. of Marion County v. Millikan, 207 Ind 142 (1934); Hall v. Essner, 208 Ind. 99 (1934); Shake v. Board of Com's. of Sullivan County, 210 Ind. 61 (1936); Leach v. City of Evansville, 211 Ind. 444 (1936); Zoercher v. Indiana Assoc. Telep. Corp., 211 Ind. 447 (1936); Rogers v. Calumet Nat'l. Bank of Hammond, 12 N. E. (2d) 261 (1938); and State v. Mears, 12 N. E. (2d) 343 (1938).

In these cases the courts used extrinsic data when it aided in reconciling otherwise inconsistent parts of the same statute, or when it corroborated a result otherwise independently reached by a consideration of the statute's text, or when there was "monstrous absurdity" in the statute, on a literal reading thereof. Perhaps it is fair to say that the expressions favorable to the "clear meaning rule" to be found in the opinions of the State of Indiana are not as strong as those found in the Federal opinions down to 1920 and hence that there is no insuperable barrier for Indiana Courts to resort to matters extrinsic to the text whenever such matters reveal an ambiguity in what otherwise seems to be the clear language of a statute. This is certainly the direction in which the evolution of the law of statutory construction can profitably move.

How have other states acted concerning the construction of their own statutes and Constitution? How freely have they resorted to matters extrinsic to the text in arriving at a conclusion? The decisions are scattered and far from conclusive.

Negatively, there are clear holdings that a court cannot safely rely on the general legislative debates—even if these are available in a preserved form, as they seldom are—except perhaps, for the purpose of informing itself as to the particular mischief which the statute was designed to remedy. This use was illustrated in Woollcott v. Shubert decided by the Court of Appeals of New York in 1916 [217 N. Y. 212 at 221].

As to practical construction there is more affirmative unanimity than on any other point. Where there is a found ambiguity such evidence has been held highly persuasive in Florida, Minnesota, Ohio, New York, Virginia, Wisconsin and doubtless in many other states for which I have no citation of authority [Bloxham v. Consumers' Etc. R. R. Co., 36 Fla. 519 (1895); Estate of Boutin, 149 Minn. 148 (1921); Hennepin County v. Ryberg, 168 Minn. 385 (1926); Matter of Stupack, 274 N. Y. 198 (1937); Industrial Com'n. v. Brown, 92 Oh. St. 309 (1915); City of Richmond v. Drewry-Hughes Co., 122 Va. 178 at 193 (1918); Union F. H. S. Dist. of Montfort v. Union F. H. S. Dist of Cobb, 216 Wis. 102 (1934)]. When the question has arisen courts have found it difficult to determine whether the "ambiguity" requisite for an application of the rule in this restricted form, was present. Thus an identically worded statute was found by *Iowa* to be "too clear" to permit resort to extrinsic aids [N. Y. Life Ins. Co. v. Burbank, 209 Iowa 199 (1927)] and by *Minnesota* to be *"sufficiently ambiguous"* to permit such resort [Hennepin County v. Ryberg, 168 Minn. 385 (1926)].

As to the history of the bill between its introduction into the legislature and its enactment by that body, in so far as this history is confined to the record of changes, or proposed changes in its text, the courts of New Jersey and New York have received such evidence. [Wiley v. Solvay Process Co., 215 N. Y. 584 (1915); State Board of Milk Control v. Richman Ice Cream Co., 117 N. J. Eq. 296 (1934)]. In Arkansas, on the contrary, the value of such evidence was declared in 1899 to be negligible [State v. Lancashire Ins. Co., 66 Ark. 466]. The date of this case lessens its significance since even the Supreme Court of the United States felt very similarly at that time.

Occasionally a State has a special commission appointed to draft legislation in a particular field. Courts commonly feel completely at liberty to resort to the report of such a commission in construing the legislation enacted as a result of the labors of the commission. Occasionally a judge who has also been on such a commission thinks it necessary to differentiate between his recollections of the commission's motives and the record of the commission's motives as they are found in its reports [Estate of Bommer, 159 Misc. 511 (1936)]. This stress upon the divided personality of the commissioner-judge does not seem necessary [see Moyer v. Gross, 2 Penrose & Watt. 172 (1830)].

The State courts have divided as to the use of the report of a legislative committee which drafted the statute or deliberated thereon prior to its enactment. Such a report has been rejected as an aid to construction in Connecticut [Litchfield v. Bridgeport, 103 Conn. 565

(1925)] and received in Wisconsin [Pellett v. Industrial Commission, 162 Wis. 596 (1916)].

It is obvious that the judicial experts in the science of statutory construction in the state courts, and with respect to state legislation, have been much more hesitant and infrequent in resorting to matters extrinsic to the text of a statute than have the Justices of the Supreme Court of the United States in handling like problems with respect to Federal legislation. No one can seriously urge that this is due to the fact that state legislation is more crystal clear than Congressional enactments, and hence less often gives occasion for such resort. Nor do I believe that it can be established that the state judiciaries are in general more imbued with the medieval mystic awe for a written instrument, or more reluctant to utilize aid available to them for the effective doing of their tasks, than are the members of the Supreme Court of the United States. Rather, I attribute this embryonic condition of the science of statutory construction in the courts of our several states to the general *non-availability of the needed materials* in the case of state legislation. The work of the legislative committees of our States is inadequately financed and inadequately recorded.

Is this economy? I do not believe so. I am not suggesting that each state have its local "Congressional Record." That would be largely a waste of good paper and of public moneys as it is today in both Washington and Harrisburg. I *am* suggesting that we recognize the undoubted importance of the work done in the committees of a state legislature; that on all important legislation, such a committee be required to deliberate and to make a written report, and that the skilled aid of legal, economic and drafting experts be available to such committees. Money thus expended will improve the quality of legislation enacted, will lessen the uncertainties as to the meanings of the bills which become law and will provide safe guidance for the courts of the state when they are required to engage in statutory construction.

I submit that our discussion justifies three conclusions. *In the first place,* the wise position of those courts which construe a statute as an entirety, taking into full account all of the provisions found within its four corners, deserves to be extended to the construction of private instruments, so as to eliminate the tendency toward piecemeal construction of wills and other conveyances which is still sometimes found in certain states. *In the second place,* the hesitant and intermittent and qualified resort to matters extrinsic to the text of a statute, in the search for the "idea" sought to be embodied therein, could profitably be replaced by broad acceptance of that idea which has been recognized in some states as to wills, and in the Supreme Court of the United States as to Congressional legislation, namely, that the circumstances of the instrument's formulation should be broadly admissible and should be resorted to not only for the resolution of doubts otherwise engendered but also for the ascertainment of whether doubt is thus engendered, as to the purpose or meaning of the language found in such statutes. *In the third place,* as lawyers, many of whom have large influence in the legislative halls of our several states, we have an opportunity and a duty to increase the effectiveness of the work of legislative committees and to perpetuate for future use, when needed, the record of the work done and done well in these committees.

IV.

Diagnosis and resolution of problems in construction involving future interests in donative conveyances.

Wills, and inter vivos instruments employed as substitutes for a will, frequently purport to create future interests. Instruments of this sort very commonly present important problems of construction. The task of the lawyer is two-fold. First and foremost he must be able to recognize the existence of such a problem and secondly he must face and resolve the problem so encountered. Some of our states have very few reported decisions in the field of future interest. To some extent this is due to the scarcity in such states of persons of large wealth. To no small degree it is due to the failure of lawyers to see the problems presented by the wills which cross their desks.

Diagnosis in law is like diagnosis in medicine. Excellence in it presupposes extensive awareness of the possibilities which can be encountered. Many lawyers have not explored with care the mysteries of future interests. Consequently this is a branch of the law where lawyers cannot afford to deny themselves the guidance made available to them by the Restatement of the Law of Property. Volume II of this Restatement was published in 1936 and contains some 529 pages of text dealing with the classification and characteristics of future interests. Volume III of this Restatement is now in its final stages. It deals with constructional problems of the types commonly encountered in wills and similar instruments. Taken together, these two volumes furnish the profession with tools, better than have ever before been available, for the handling of the problems of construction which arise in connection with wills and similar instruments.

The readers of this Journal require no information as to the carefulness with which the work of the American Law Institute has been done. As to the work done concerning Future Interests the writer can speak feelingly. The preparation of these Chapters has been preceded by a careful collection and study of approximately 7,500 decisions rendered by courts throughout the United States. The significances of these decisions has been weighed not only by this writer, working as the Reporter in charge of the task, but also by a group which includes many of the outstanding authorities of the present day in this branch of the law. Each chapter in these volumes has been redrafted and reconsidered by the group at least three times, and, in some instances, a chapter has been reworked as many as eight times. Where inconsistent decisions have been found, the relative merits of the possible positions have been weighed and the Restatement embodies the considered judgment of the Institute as to the position most likely to prevail in a case well argued before a court able and anxious to reach a sound result.

It is not possible to retrace here the contents of these two volumes. Four of their chapters will be used as illustrations of the helpfulness which they afford to the busy judge or lawyer who encounters a problem in this field. These are Chapters 7, 20, 22 and 23.

Chapter 7 deals with terminology and classification. Even a tyro in this field has heard of "reversions," "remainders" and "executory interests." The expert talks of many other types of future interests and of subdivisions necessarily to be made as to each of these three. These names are not merely survivals from ancient history. Nor are they merely terms which

(*Continued on page* 194)

A STUDY OF PORTRAYALS OF LAWYERS, JUDGES AND COURT ROOM SCENES IN MOTION PICTURES

Interesting Document Submitted to the Production Code Administration for the Six Months' Period Commencing July 1, 1938 and Ending December 31, 1938—Profession Will Be Gratified to Note Precautions Taken to Present It Fairly—Pertinent Sections of the Production Code—General Statement of Policy as to Professions—Study Summarized—Characterization of Lawyers and Judges and Presentation of Court Room Scenes—Illustrative Quotations from PCA Opinions, etc.

Editor's Note

CONFLICT is the essence of drama. There must be heroes and villains. Motion pictures are a mirror reflecting nature and life. In pictures, therefore, it is necessary to portray all kinds of characters.

Groups object to one of their number being characterized unsympathetically. It has been observed, somewhat humorously, "that if all these objections were given full effect, the 'heavy' in motion pictures would have to be a native white American, without a college education or professional status, who belonged to no fraternal, political, religious or social organization, and who was unemployed."

Now, to characterize a member of any profession in an unfavorable light is not to indict that profession as a whole. Good and bad members of professions exist in life. Yet, no one feels an entire profession is discredited simply because an individual errs.

The motion picture industry recognizes these self-evident truths in the extreme care it exercises, day by day, to see that professional groups as a whole are treated fairly on the screen. The problem of finding "villains" to furnish the necessary dramatic conflict is unusually difficult because films make fiction seem so real.

How this care is exercised, so far as the legal profession specifically is concerned, is described herewith in the study of the portrayals of lawyers, judges and court room scenes in photoplays submitted to the Production Code Administration from July 1 to December 31, 1938.

The Production Code Administration is a branch of the Motion Picture Producers and Distributors of America, of which Will H. Hays, himself a distinguished member of the Bar, is President. It is the PCA's specific task to administer the Motion Picture Production Code, which sets high standards of wholesomeness and good taste in films.

THE JOURNAL presents the study because it believes that these activities of Mr. Hays' office deserve not only the thoughtful attention and consideration but, on the basis of the record, the appreciation of the legal profession.

It is entitled "A Study of the Portrayals of Lawyers, Judges, and Court Room Scenes in Motion Pictures, Submitted to the Production Code Administration of the Motion Picture Producers and Distributors of America, Inc., for the Six Months' Period Commencing July 1, 1938, and Ending December 31, 1938," and reads as follows:

I. INTRODUCTORY

A—Pertinent sections of the Production Code

The Production Code (adopted by the M. P. P. D. A. in 1930) provides that "Law, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation." In the "Reasons Supporting The General Principles" of the Code appears the following comment with regard to the above section:

"By natural law is understood the law which is written in the hearts of all mankind, the great underlying principles of right and justice dictated by conscience.

"By human law is understood the law written by civilized nations.

"1. The presentation of crimes against the law is often necessary for the carrying out of the plot. But the presentation must not throw sympathy with the crime as against the law nor with the criminal as against those who punish him.

"2. The courts of the land should not be presented as unjust. This does not mean that a single court may not be represented as unjust, much less that a single court official must not be presented this way. But the court system of the country must not suffer as a result of this presentation."

B—The Annotations of the Production Code, prepared in 1937-38, carry the following general statement of policy under the title "Professions":

"All of the professions should be presented fairly in motion pictures.

"There should be no dialogue or scenes indicating that all, or a majority of the members of any professional group, are unethical, immoral, given to criminal activities, and the like.

"Where a given member of any profession is to be a heavy or unsympathetic character, this should be off-set by showing upright members of the same profession condemning the unethical acts or conduct of the heavy or unsympathetic character.

Where a member of any profession is guilty of criminal conduct, there should be proper legal punishment for such criminal conduct—such punishment to be shown or indicated clearly."

A cross reference in the annotations re: "Lawyers" contains the following specific application of the above mentioned statement of policy:

"So long as stories are written, and plays and motion pictures produced, there will always be a considerable number which will deal with lawyers and court

room scenes. The reason for this is that drama deals with 'conflict,' and there is much dramatic conflict present in the practice of the law, since lawyers are involved where issues and problems have arisen which need legal interpretation or solution.

Sometimes dishonest, or shyster, lawyers appear in plays or motion pictures just as they exist in everyday life. Where dishonest or unethical, lawyers appear in pictures, there should be shown also ethical and high principled lawyers who off-set the other type, and who condemn them. The lawyer who commits criminal acts should be punished properly for his misdeeds which are shown clearly to be wrong."

II. STUDY SUMMARIZED

During the second half of 1938, 314 feature pictures were approved by the Production Code Administration—a board of 11 men (of whom three are lawyers) charged with responsibility for administering the Production Code. This board issues approximately 500 opinions a month regarding the suitability under the Code of story summaries, scripts, script revisions, and completed films. If a completed film upon official review is found to conform to the Production Code, a Certificate of Approval is issued therefor and the number of the certificate and the seal of the Association are placed upon the main title of the film.

In addition to dealing specifically with the application of Code provisions to story theme and detailed treatment, the Production Code Administration includes in its opinions numerous suggestions of an advisory nature relative to possible reaction of segments of the public, such as professional groups, to a proposed characterization of a member of such group.

Included in the 314 feature pictures submitted to the Production Code Administration for the six months ending December 31, 1938, were 21 feature pictures in which lawyers appeared in prominent roles; 8 feature pictures in which judges appeared in prominent roles; 33 other feature pictures in which lawyers appeared in minor roles. Twenty-four judges were portrayed in minor roles during the same period while 42 pictures contained scenes in court rooms.

A—Characterization of Lawyers

In the 21 pictures in which lawyers played prominent roles, 27 different roles were played "straight" while one role was played for comedy. In other words, 28 lawyers were shown as prominent characters in these 21 pictures. Twenty-two of these 28 roles were portrayed *sympathetically* and 6 lawyers unsympathetically. It should be noted, however, that in only one of the 28 pictures in which lawyers were prominent characters, was there an unsympathetic portrayal of a lawyer without a contrasting lawyer appearing as a sympathetic character.

In the 33 additional pictures approved during this period in which lawyers played minor roles, 37 different lawyers were characterized. Thirty-three of these 37 lawyers were played "straight" while 4 were played for comedy. Of the 37 lawyers playing these minor roles, 23 were cast as sympathetic characters, 12 as unsympathetic characters, while the characterizations of 2 were "indifferent." In 5 of the 12 pictures in which lawyers playing minor roles appeared as unsympathetic characters, there were also lawyers playing minor roles who appeared as sympathetic characters.

To summarize as to lawyers: The record for six months shows 54 pictures out of a total of 314 approved films in which 65 lawyers appeared in prominent or minor roles. Of these 65 lawyers, 45 were sympathetic characters, 18 were unsympathetic characters, while two were indifferently characterized. *BUT* only one "prominent" lawyer and seven lawyers in minor roles were portrayed unsympathetically without a sympathetic characterization of a member of the profession appearing in the same film by way of contrast.

B—Characterization of Judges

During the six months period under review, 8 pictures were approved in which judges played prominent roles and 24 pictures in which judges played minor roles. Seven of the eight judges prominently portrayed and 20 of the 24 cast in minor roles were sympathetic characters. One "prominent" judge appeared as an unsympathetic character; one judge appearing in a minor role was listed by the reviewer as sympathetic in part and unsympathetic in part; the remaining three judges were cast in such minor roles that their characterizations were too hazy to be listed as anything more than "indifferent."

While there was admittedly a flavor of comedy about the portrayals of five of the judges cast in sympathetic minor roles, three of these were "Westerns" where the living conditions were quite primitive and the court procedure necessarily informal; a fourth was a Reno divorce case in which the judge happily brought an estranged couple back together again in a comedy setting; and the fifth instance was "You Can't Take It With You" in which a police judge vainly tried to maintain his customary decorum when the leading figures of this heart-warming story were brought before him in connection with the shooting off of some fireworks in the basement of a home.

To summarize as to Judges: The record for six months reveals that 32 different judges were shown in 32 pictures. Of these 27 were sympathetic characters, with five of the 27 contributing to comedy situations in unusual conditions. The characterization of one additional judge was described as being both sympathetic and unsympathetic. The characterization of three judges in minor roles was described as indifferent. Only one judge out of the 32 was definitely cast in an unsympathetic role.

C—Portrayal of Court Room Scenes

In the 21 pictures in which lawyers were portrayed prominently and the 8 pictures in which judges were portrayed prominently (a total of 29 pictures) there were 15 court room sequences, 14 of which were handled in a dignified manner according to the analysis charts, while in the fifteenth the reviewer checked it as being dignified in part and comic in part. In the other 14 pictures in which lawyers or judges appeared prominently, there were no court room scenes at all. In 27 additional pictures in which lawyers or judges appeared as minor characters, scenes in court rooms were portrayed. Twenty of these were handled with dignity and 7 others contained comic elements—5 of the 7 being "Westerns" and the other 2—"The Higgins Family" and the picture previously mentioned "You Can't Take It With You," to neither of which could any responsible person take exception.

To summarize as to Court Room Scenes: In the pictures in which lawyers or judges played prominent or minor roles, 42 court room scenes were filmed, of which 34 were listed as being dignified, while there were comedy situations in the remaining eight.

III. Illustrative Quotations from PCA Opinions Re: Pictures Approved July-December 1938 in Which Lawyers or Judges Played Prominent Roles.

The regular procedure, after two members of the Production Code Administration have studied a script for a contemplated feature picture, is to discuss both possible code violations and important policy questions in the regular daily conference of the board after which the board member designated prepares an advisory opinion addressed to the producer, in which deletions or changes required under specific code provisions are listed, precautionary warnings are voiced and suggestions with regard to policy matters are advanced for the guidance of the producer. These early opinions are described as "advisory" because the final opinion, rendered after a review of the finished picture, is the formal document from which an appeal to the board of directors of the Motion Picture Producers and Distributors of America, Inc., may be filed.

The following quotations from typical opinions written concerning pictures included in this study summary will illustrate the care with which the Production Code Administration seeks to prevent the misdeeds of a particular lawyer from being imputed to the legal profession as a whole.

No. 4724: After reading the script for this picture the Production Code Administration under date of August 17, 1938, wrote the producer as follows:

"Scenes 25, 26 and 27: The speeches by 'G' are much too general, in that they indicate that all lawyers have to 'betray justice and the law' in order to be successful. All of this should be re-written to get away from the present flavor."

Again on August 31, 1938, after reading a revised script a PCA opinion said:

"We feel that some punishment should be indicated for the crooked attorney. This might be handled by having the judge in the court indicate that he is going to have this lawyer investigated by the Grand Jury or the Bar Association."

Finally on September 7, 1938, the PCA advised the producers as follows:

"We have asked you before to indicate some punishment for the crooked lawyer. To date you have not done this. We suggest that in Scene No. 362 the judge indicate that R's conduct will be brought to the attention of the Grand Jury for proper action."

No. 4822: On September 20, 1938, the PCA in a letter to the producers stated with reference to the script for this picture:

"Page 79: The suggestion in the following line that the attorney is unethical in his practice is open to some objection. We suggest that this be deleted or changed. The line to which we refer (spoken of the attorney) is: '. . . whose guilt was known to everybody. . . .'"

Again on September 23, 1938, the PCA wrote the producer as follows:

"Throughout the story care should be taken with the characterization of this lawyer to avoid offense to the legal profession as a whole."

No. 4478: On June 11, 1938, (Picture approved after July 1st) the producer was advised:

"As a matter of general caution, care should be taken to avoid material, or flavor, which reflects unfavorably on the legal profession as a whole."

Again on June 15th, following a personal conference between members of the PCA and the producer of this picture, the PCA wrote in part as follows:

"In our conference the other day we suggested that since the early portion of the story makes clear that both 'C' and 'B' are unethical in their legal practices, and that the latter as well, is crooked, this material might be objectionable to members of the legal profession.

"We suggested that the court room scene conclude with a dignified and vigorous condemnation on the part of the court. Upon reading the script we feel that such condemnation is essential.

"We further suggest that material be injected making it quite clear that 'B' realizes the wrongfulness of his criminal acts, condemns himself for his past misdeeds and regenerates completely."

Cautions, of which the above are examples, are regularly included in advisory opinions from the Production Code Administration to picture producers in order to emphasize the importance of differentiating, in the picture itself, between one member of the legal profession who may be a discredit to it and the profession as a whole.

It should be remembered in this connection that 14 different companies made the 29 pictures in which lawyers or judges appeared as prominent characters. One of these pictures was produced in England and another in France. Some were produced by companies which are members of the Motion Picture Producers and Distributors of America, Inc., obligated to submit scripts in advance, while others were produced by companies which are not members of this trade association but which voluntarily submit their product to it for Certificate of Approval.

A Rejected Film

Special attention should be called to a film which was presented to, and rejected by the PCA in December, 1938, specifically because it violated the section of the Production Code quoted in the beginning of this study. In this rejected film a witness to a motor accident who was called to the stand to testify in a civil suit, was shown unceremoniously fined by the judge without any charge being preferred against him. The judge was shown acting in a highly arbitrary manner in throwing this innocent witness into jail upon failure to pay a fine levied against him without any pretense of "due process of law."

Under date of December 27th, the PCA wrote the producer as follows:

"It is our opinion, therefore, that the dialogue and action to which we have referred violates the section of the Production Code which stipulates that 'Law, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation.'

"We are still of the opinion that this picture ridicules human law, presents the courts of the land as unjust, and tends to make the courts suffer as a result of this presentation."

Certificate of Approval was therefore denied this picture, and its public exhibition indefinitely postponed.

This study was limited to the 314 pictures presented to the Production Code Administration for approval during the last half of 1938, because complete data was available covering this period. It is possible that pictures approved prior to this period and still in the stream of distribution and public exhibition contained unsympathetic characterizations of lawyers or judges. The point is that the machinery of the Production Code Administration is now functioning so effectively and previous warnings to producers are

now being heeded so generally that the situation with respect to the characterizations of members of the legal profession is today well in hand.

It appears from this study, not only that the Production Code Administration is suggesting to producers specific changes with reference to the characterizations of lawyers and judges, but is also refusing to approve pictures which reflect upon the entire court system of the country and ridicule the administration of justice.

Obviously if stories based upon realistic life situations are to be filmed; if the drama of today is to prove worthy of the great traditions of the Greeks and of Shakespeare, then there must be "villains" and they must come from every race, class and profession. Hence individual lawyers, from time to time, may be cast in roles which reveal them as a discredit to their professions. When lawyers cease to be disbarred; when bar associations no longer find it necessary to appoint committees on character and fitness—then and then only will it be appropriate to insist that no lawyer should ever be made the villain in a screen drama. But paraphrasing Edmund Burke's famous statement that "You cannot indict a whole nation," let it be said with equal fervor that the organized motion picture industry through its trade association, headed by Will H. Hays, is insisting today and will continue to insist that motion pictures bearing its seal of approval, while exposing the human frailties of individuals, shall not indict an entire profession.

Construction of Written Instruments

(*Continued from page* 190)

a lawyer can use to amaze his simple clients and to appear learned in the view of the uninitiate. They serve presently useful objectives as a shorthand mode of transition from the varying forms of limitations by which each can be created to the varying aggregates of consequences which each connotes. But this present utility of these names requires that our terminology be exact and that each term be used by law teachers, lawyers and judges with a single and clear-cut inclusiveness. It is the effort of Chapter 7 to collate the present best usage of the profession and thus to make available to all who find it necessary to work in this field a common point of departure for the handling of the problems to be encountered therein. Precision in the use of language has long been recognized as an essential to clarity of legal thought. If we start our consideration of a problem of construction with rather definite ideas of the types of future interests permitted by the law, progress in diagnosis of the problems presented by an instrument is substantially facilitated.

Hence Chapter 7 divides future interests creatable in persons other than the conveyor into five kinds, namely, executory interests, remainders indefeasibly vested, remainders vested subject to complete defeasance, remainders vested subject to open and remainders subject to a condition precedent. Each of these five types has its own series of possible creating limitations and each has its own peculiar agglomerate of characteristics. Similarly it differentiates those future interests left in a conveyor into powers of termination, indefeasibly vested reversions, defeasibly vested reversions and reversions subject to a condition precedent. This last category is more commonly referred to as a possibility of reverter. These nine categories of future interests find recognition in the decisions of every state, but their names are often used loosely and without precision. It is hoped that the Restatement will aid in eliminating these factors which contribute so largely to the supposed difficulty in the law of future interests. Chapter 7 does not itself settle any problems of the lawyer. It does facilitate the lawyerlike approach to a problem. It does quicken the apprehension of problems and thus saves time which is the chief commodity which we, as lawyers, have to sell.

The material to be found in Chapter 20 involves the construction of gifts over on "death" or on "death without issue." This is a subject as to which the bulk of American cases is great. In each state there is a body of authority varying from a score to six or seven hundred cases. It is the field in which the early English preference for the "indefinite failure of issue" construction has encountered the unwelcoming atmosphere of our shores with resultant legislation in many states declaring a preference for a "definite failure of issue" construction, and judicial gymnastics in other states to reach results consonant with conditions in this country. The statutes starting in Virginia in 1819 have spread into twenty-seven states and the District of Columbia. That leaves twenty-one states without a statutory factor in the problem. The so-called "substitutional rule" was invented in this country shortly after 1850 as *a* way although not a wise way to escape the preference handed down by the common law for an indefinite failure of issue. The "intermediate date construction" has gradually gained widespread acceptance both where the statute exists and where it is absent. Even in Indiana and Missouri where the "substitutional rule" has taken root and grown like the weed which it is, this intermediate date construction has some acceptance. The rules stated in Chapter 20 set forth the varying types of limitations which raise these problems and for each the prevailing construction and the factors tending to establish other constructions. It constitutes an analytical aid and a guide to prevailing policies of construction not elsewhere to be found.

Similarly Chapters 22 and 23 undertake to untangle and to clarify the mysteries which surround the subject of class gifts. A will of even moderate complexity is seldom found without one or more limitations in favor of some group. These groups are commonly described by some one of fourteen terms, namely, "children," "grandchildren," "brothers," "sisters," "nephews," "nieces," "cousins," "issue," "descendants," "family," "heirs," "heirs of the body," "next of kin" or "relatives." Limitations which describe the group intended to take by some one of the first ten terms are treated in Chapter 22 while those involving anyone of the last four are covered by the rules stated in Chapter 23. This last chapter was prepared under the particular supervision of Professor A. James Casner, now visiting Professor at Harvard University School of Law. As to each of the listed terms, the decided cases give to us rather definite rules for the ascertainment of the intended takers. It is not possible in the few sentences of this article devoted to these chapters to set forth even a skeleton of the analysis and treatment presented by their more than 300 pages. It must suffice to say that by treating each type of limitation separately to the extent that decisions deal differently with it, we believe that we have so broken down the problems raised by class gifts into a series of relatively simple problems, that lawyers and judges will find this field of law no longer as troublesome as heretofore.

SAN FRANCISCO: A LITTLE JOURNEY THROUGH ITS FASCINATING PAST AND PRESENT

Soldier and Priest Collaborated to Make the Settlement by This "Port of Ports"—The San Francisco of Gold and Forty-Nine—Cosmopolitan Elements in the City's Present Life—Famous Men in Its Early History—San Francisco of the "Neglected Sixties"—Notable Literary Figures—Bay Compared with the Bay of Naples and the Golden Horn—Bret Harte's Characterization of City, etc.

By Edward F. O'Day
Editor of the Recorder, San Francisco

San Francisco has linked its past to its present and future by two great bridges, one across the Golden Gate, the other reaching over San Francisco Bay. To celebrate the completion of these spans, the City of St. Francis conceived and brought to life an Exposition on man-made land adjoining Yerba Buena Island in the midst of the harbor.

This Golden Gate International Exposition is now open. It was a major factor in determining the choice of San Francisco as the American Bar Association convention city of 1939.

The author of this article has endeavored, without guide book particularity, to indicate something of the charm that invests "a city loved around the world," a city which, true to its traditions of hospitality, is quite confident that its lawyers will give their colleagues a rousing welcome when they journey West in July.

ONE morning a good many years ago the writer had the privilege of showing San Francisco to Harry Leon Wilson and Irvin S. Cobb. It was a Sunday of crystal sunshine with a sky of the blue purity that lives in a Siamese sapphire. The creator of Ma Pettingill and the creator of Judge Priest stood at the top of the climbing boulevard that encircles Twin Peaks and looked down upon the city. "It beats Naples," said Harry Leon Wilson. "And Constantinople," said Irvin S. Cobb.

Most of the world's great cities have drawn their greatness from the water—witness London and Venice—but these two observers immediately linked San Francisco with the two cities of deathless civilization that drew not only their greatness but their distinctive beauty from the sea. The Bay of Naples and the Golden Horn are actually the Mediterranean. San Francisco Bay and the Golden Gate are essentially the Pacific, which is the ocean of the centuries to come.

From that coign of vantage on Twin Peaks, the Pacific Ocean, the Golden Gate, and our land-locked harbor are seen as a loop of blue water embracing a close-built metropolis of skyscrapers, homes, factories, blooming gardens, and evergreen parks. This loop of water accounts for San Francisco. It determined the position of our city and controls our metropolitan and international destiny.

Beholding that crescent of blue water from Twin Peaks in the year of the Declaration of Independence, a gray-robed Franciscan friar wrote in the diary he kept by direction of the Viceroy of Spain, "The port of San Francisco is a wonder of nature, and may be called the port of ports." Whereupon Lieutenant Colonel Anza, who had explored up from Mexico for a northern city site, decided that this was the spot to please His Catholic Majesty King Charles III of Spain and to check the encroaching Russians from Alaska.

Behind the serried hills at the northern tip of our peninsula is the Presidio Anza founded for his Spanish troops. It was only a generation later, in the adobe residences of her father, the Spanish commandante—a landmark still standing in our Presidio—that the beautiful Concepción Arguello lost her heart to the Russian Viceroy Razanov with consequences that made the western world's most sublime tragedy of love. Today from the park-like precincts of this same Presidio, army planes roar forth to greet the Pacific Fleet as it enters the Golden Gate.

Directly below Twin Peaks, in the kindliest region of our peninsula, the adobe Mission Church of St. Francis of Assisi still stands on the spot that Anza designated, and the bronze bells of Mexico that Padre Junipero Serra rang to call the Indians to Christ, still peal over the little churchyard where Spanish commandantes, Mexican governors, and Indian proselytes lie buried.

Thus soldier and priest collaborated to make a settlement by this "port of ports," and the first trails were beaten by the sandals of the Franciscans and the horses of the caballeros through the lupin and the poppies that flourished between the Presidio and the Mission. The lupin and the poppies are hill flowers, and it was, and is, her hills that make San Francisco so beautiful. There are seven times seven now, but there used to be more—those of shifting sand were scooped away in later years to make room for a gridiron of gringo streets. Left alone, the town would have grown according to the suave dictates of its natural contours, its byways curling upward terrace by terrace, and its highway criss-crossing the narrow peninsula in gentle dips and rises from the Golden Gate to the San Bruno Mountains, and from the Embarcadero to the ocean.

That was not to be. Yerba Buena (which was our city's name before 1847) was left pretty much alone by the Spaniards and their Mexican successors, but the San Francisco of Gold and Forty-Nine sprang suddenly into a city of fifty thousand souls, and at

once the peninsula began to take on the conventional pattern of an American city. It was years before this process was completed; but once finished, even the genius of a Daniel H. Burnham, dreaming here magnificently after the disaster of 1906, was as powerless to undo the mischief as Sir Christopher Wren was to remake London after the fire of 1666. Market street alone was permitted to violate the geometrical symmetry of the pattern, and perhaps we shall be pardoned for glorying in this tangent thoroughfare that dips its feet in San Francisco Bay, cuts its broad swath to the heart of the peninsula, and rests its head in the lap of Twin Peaks.

From Forty-Nine, all our other streets have run blatantly rectangular, yet because they scale and toboggan the city's many hills they can effect here and there a coaxing seclusiveness and contrive to hide many mysteries.

San Francisco invented the cable car and still uses it, a bit apologetically, for hill climbing. Following one of the slotted roadbeds, you gain the crest of Nob Hill where the nabobs of the Comstock Bonanza and the Central Pacific built their ostentatious palaces. Chinatown tucked itself away behind that hill, quite willing to be unobserved, preserving a stolid Oriental nonchalance even when the Barbary Coast roared up from the waterfront to the barred teakwood doors of its old depravity and the joss houses of its bland idolatry. Chinatown is still there, with a great deal that enriches the eye and lightens the purse of the tourist, and with not very much to hide except a slave girl or so, a smuggled tin of opium, a game of fan tan and a lottery ticket.

But the Barbary Coast—the Barbary Coast is another story.

When John Masefield, not at that time the poet laureate of England, arrived at the Ferry Building in San Francisco, he was met by our beloved and never-to-be-forgotten George Sterling. As the singer of our "cool gray city of love" led the singer of ships and cargoes across the Embarcadero to a taxicab, Masefield said, "Take me to the Barbary Coast," and our San Francisco poet could only reply: "Ichabod! Its bad mad glory has departed."

The Barbary Coast of Stevenson and Kipling had to go. It was picturesque, but it was not twentieth-century. In the earliest days of gold, the murderers, thieves, and crimps of its predecessors Sydney Town and Little Chile provoked the first Vigilance Committee and when those racketeers and gunmen of the infant city had been hanged, transported, or terrified into flight, Sydney Town and Little Chile disappeared. Later came the Barbary Coast of much more enduring infamy. Its dives, though not its hell kitchens of blood and knockout drops, rose again after the cleansing fire of 1906. But the scandal of ever-increasing slumming crowds that elbowed its thirsty sailors and painted harridans from its dancing floors, was too much to be endured, so it was put to death by the police even before the Volstead Act was born. It expired before George Sterling could show it to John Masefield, and it will never again come to life.

These were sinister things that sought the convenient shadows of San Francisco slopes, but there are to be found in the folds of our hillsides sudden surprises of beauty, exuberant, quaint, provocative, exotic and (some of us like to say) distinctively San Franciscan. Seen from Twin Peaks, the lesser crests charm the eye with rising and falling lines of roofs, pink and yellow, red and white and green. They make you think of Spanish scarves tossed down in the gay and graceful abandon of fiesta time.

In San Francisco you must not think only of Toledo or Seville. At sea level, San Francisco is one hundred per cent American, but on her hills she is cosmopolitan.

In the indentations of Bernal Heights there are many Russians who still bless themselves and stroke their beards doubtfully when the talk turns on Moscow and Stalin.

Amid the sedate homes congested on the Mission Hills the Hindus set up a printing press to stimulate another Indian Mutiny during the early days of the World War.

The Greeks have not succeeded in making an Athenian Acropolis of Rincon Hill, but they swarm in its environs, blazoning their coffee houses and printing shops with high-sounding signs in the language of Homer, Plato, and Venizelos.

In the precipitous approaches to Telegraph Hill there are many Mexicans and Porto Ricans, but the hill itself is the roost of serious young men and women who speak many other tongues but all paint and etch and worry clay in the language of art moderne. In the days of '49 a semaphore on Telegraph Hill signalled the approach of the clipper ships; nowadays that particular part of our skyline is a-flutter with the gesticulations of geniuses whose meaning many of us cannot understand. Telegraph Hill is our Montmartre.

There are more conservative studios on Russian Hill, also the ample homes of those wealthy patrons without whom art might talk but could not eat and drink.

In the hollows of these hills lies Little Italy, reminiscent of Naples and Genoa. Here we have a teeming street life every sunny day, with more bambinos to a block than Raphael ever painted, and with restaurants named after Italian poets and Italian operas where the spaghetti is a poem in prose, the sanddab from Fisherman's Wharf a perfect lyric, and where the zabayone with its flavor of Marsala and Maraschino brandy, sings an aria in your brain.

Here, too, are pensions with modest tables d'hote where Spaniards can be induced at times to speak of the leagues of land their great-grandfathers held before the gringo came, and where Basques make merry quite gravely when they come to San Francisco from the sheep ranges of Monterey County and Nevada, the wages of a whole year burning holes in their leather pouches.

On the slopes east and west of Fillmore Street and above Divisadero on California we find the Japanese ensconced in an ever-expanding Little Nippon. Many of them, but not as many as the Chinese, are native born and therefore voters.

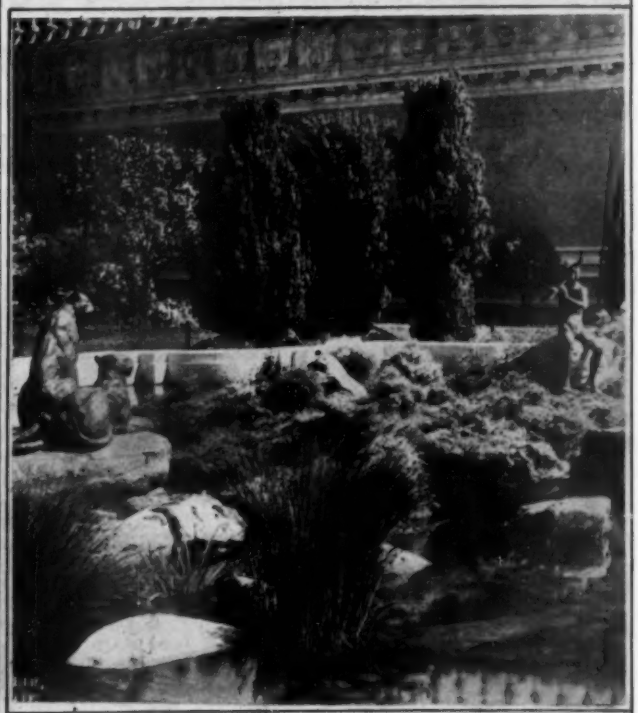
And finally, to close the circle of San Francisco hills, we have Lone Mountain, a hill of abandoned cemeteries in the heart of the residence district, whose huge cross the sailors used to sight far out at sea. It is now crowned by a college for young women whose turrets blend on the skyline with the towers of the University of San Francisco on nearby Ignatian Heights.

Descending from these hills, we come to closer grips with the city's history. The town of '49 hugged the northern point of a wide, shallow cove, climbing slowly over the chaparral of the sand hills to the west and south. The gold-mad crews deserted from the

WAR MEMORIAL OPERA HOUSE-(LEFT) AND WAR MEMORIAL MUSEUM AND AUDITORIUM

GABRIEL MOULIN PHOTO

CITY HALL, CIVIC CENTER
SAN FRANCISCO



POOL IN FRONT OF DEYOUNG MEMORIAL MUSEUM, GOLDEN GATE PARK

ships of the Argonauts, which either rotted at the wharves or did duty as warehouses and hotels. By degrees the cove was filled in, and on this "made ground" the skyscrapers of the lower business section now stand, their foundations anchored in piles driven through the mud to hardpan.

There was, however, a well-defined period of our annals when "the water came up to Montgomery Street." This was a stirring time of many constructive activities, a time also of much extravagance and devil-may-care. It was a time when impresarios who rightly judged the sound taste of an extraordinary public, brought Junius Brutus Booth, Edwin Forrest, Ada Isaacs Menken, Anna Bishop, Lola Montez, George Francis Train, and Artemus Ward to entertain fashionable audiences resplendent in satin stocks and crinolines; when two-bits was the penny of today, when nuggets and gold coin were flung across the footlights to little dancing Lotta; when fortunes changed hands every night at the gaming tables of the El Dorado and the Tontine; when gentlemen settled their differences with pistols or rifles on the field of honor; when great chefs deserted Paris and Vienna for a mushroom town at the edge of the world, laying the foundation for a gastronomic distinction that still endures; and when the overland stages and the pony express riders clattered into town amid universal acclamation with tales of hairbreadth escape from the Apaches or the Indians of the plains.

Came a time when the water went back from Montgomery Street, but all other things flowed that way—schemes of lawful and unlawful gain, the daring enterprises, throbbing passions and bold intrigues of a rich young community built by the most remarkable aggregation of young men ever assembled. Pioneers we call them; but they would have been proconsuls in ancient Rome, and would have carved out principalities for themselves in the First Crusade.

For years Montgomery Street dominated San Francisco. Consider some of those who walked its wooden pavements: U. S. Grant, William T. Sherman, Hooker, Halleck and Albert Sidney Johnston, Phil Sheridan, David G. Farragut. This, mind you, was before the Civil War, when these men were familiar figures in San Francisco and never dreamed of their subsequent renown. On this same thoroughfare we find Fremont, the Pathfinder; he lives at Black Point. Kit Carson; he lives everywhere. United States Senator Broderick, whose death at the hands of Terry, extinguished dueling in California. Thomas Starr King, who, more than any other, saved California to the Union. William Walker, "the gray-eyed man of destiny," finding along Montgomery Street plenty of human material for his filibustering expedition. The Big Four of the Nevada Comstock—Mackay, Fair, Flood and O'Brien. (Flood and O'Brien have a saloon around the corner on Washington Street). Adolph Sutro of the Sutro Baths and the Sutro Tunnel—he runs a little hotel at California and Montgomery. James Phelan, father-to-be of a United States Senator—he deals in wines and liquors on Front Street. Lucky Baldwin, who has a livery stable on Commercial Street. Here, too, we see the Big Four of the first transcontinental railroad—Huntington, Stanford, Crocker and Hopkins. And William T. Coleman, the lion-hearted leader of two Vigilance Committees. James King of William, the fearless editor of the Bulletin, who was shot down on this very street, his murderer very quickly swinging from a rope at Fort Cunnybags. William C. Ralston, who built the Bank of California and the Palace Hotel. Bret Harte, exquisitely dressed, with a poem in his pocket, on his way to work at the Mint. A newspaperman with a drawl—Mark Twain. A lean young actor thirsting for fame named Edwin Booth. A very lean young writer with burning eyes named Robert Louis Stevenson. A gas inspector with an entirely new theory of taxation named Henry George.

Without realizing it, we have covered a good many years. We have been traversing the golden Fifties when San Francisco had fire after fire that taught her to put the phoenix on her city seal, but built herself stronger and better after every holocaust. We are actually within sight of the Seventies where imagination likes to dwell on the silver magic of the Comstock Bonanza and the thrill that came with the first click of wheels on the transcontinental rails.

But in between the Fifties and the Seventies came what one of our writers has called "the almost neglected Sixties." The Sixties were for San Francisco a time of substantial growth and of necessary readjustment. In the early Sixties San Francisco developed a strength that enabled the city to survive, in the next decade, a succession of fits and fevers that might otherwise have been fatal.

Let us pause a moment or so on the San Francisco of the decade that was overshadowed by the Civil War.

In the Sixties, with a population of eighty thousand, San Francisco was undoubtedly the most cosmopolitan community in the United States. It was isolated, but not in the least provincial. Its citizens lived on a high level of civilization and culture. It was a community of distinguished educators and eloquent clergymen, brilliant professional men, bankers and merchants who had breadth and vision. Social life took a high tone from the combination of generous Southern "chivalry" with the rather constrained breeding of New York, Philadelphia and New England.

There was as yet no transcontinental railroad, and the so-called "magnetic telegraph" was a new thing. Communication with the eastern seaboard was by clipper ship around the Horn, steamer by Panama and Nicaragua, and the Overland Mail. During the Civil War the Overland Mail no longer went east by way of the pueblo of Los Angeles, Fort Yuma, and El Paso, but out of Folsom via Placerville, better known as Hangtown, and the old Emigrant Trail.

Abraham Lincoln carried San Francisco by a scant plurality in 1860. Both United States Senators for California were Democrats, but the three Congressmen and our war governor, Leland Stanford, were Republicans. There was a strong Southern sentiment in San Francisco, but the city was overwhelmingly loyal to the Union. When the news came that Fort Sumter had been fired on, there was a great patriotic demonstration.

San Francisco heaped its gold into the funds of the Sanitary Commission—the Red Cross of the Civil War—and its contributions continued so generously throughout the struggle that Dr. Bellows, organizer of the commission, paid this city a tribute that should never have been forgotten, though nobody seems to remember it now. This is the telegram that Dr. Bellows sent to San Francisco at the conclusion of the war:

"Noble, tender, faithful San Francisco, city of the heart, commercial and moral capital of the most humane and generous state in the world."

Though far away from the death struggle of North and South, San Francisco played her part in the fight-

ing. Her volunteers held the vast area of Arizona and New Mexico, as well as California. And her own sons were in the forefront of the battle. Our Colonel E. D. Baker gave his life at Ball's Bluff. And our Albert Sidney Johnston, who had been in command of the Department of California before he left San Francisco to fight for the Confederacy, was mortally stricken at Shiloh.

There is a variety of aspects in which the San Francisco of the Seventies and Eighties may be regarded. During those years the city took on the character which it bore until the eighteenth of April, 1906. Sophisticated in its social attitude, loving music and all the arts, full of hospitality and generosity, San Francisco was also characterized by much political corruption and deep economic discontent.

As for the political side of it, we need not pause on the unhappy reign of bossism and bribery that began in this epoch, to continue with alternations of reform and relapse until the great purge of the Graft Prosecution. One editorial expression of the Seventies may be quoted:

"Our official rascals," wrote one of our editors, "may be set down as the meanest in America. There appears to be nothing too small for them to appropriate. They go for everything in sight, from a horse and buggy to the shirt studs of a suicide. Everybody who has any dealings with the city has to grease the wheels. The City Hall needs reformation almost as badly as the most notorious dive on the Barbary Coast."

At this period, also, our labor troubles began, for they may be dated from the emergence of the remarkable Dennis Kearny with his demagogic attacks upon the Chinese and plutocracy. Nob Hill and the Sandlot during the heydey of Kearnyism became the twin symbols of a new deal—class consciousness came to San Francisco, and it came to stay.

However, that period gives us happier conditions to dwell upon. Let us not forget that in the year 1868 the Overland Monthly had been founded. And with the advent of the Overland, San Francisco shone in the glory of Bret Harte.

It was Bret Harte who first made the world realize that San Francisco was cultivating literature. "The Luck of Roaring Camp" was as much of a sensation in London and Paris as it was in New York and Boston. And that humorous masterpiece, "The Heathen Chinee," was an even greater success.

In the famous lines:

> Serene, indifferent of fate,
> Thou sittest at the western gate,

Bret Harte fixed the character of San Francisco for people all over the world. That poem was an interpretation and a prophecy.

"It is an odd thing," wrote Oscar Wilde, "but everyone is said to be seen at San Francisco. It must be a delightful city, and possess all the attractions of the next world." That was before Oscar Wilde came to San Francisco with his sunflower and his velvet jacket to lecture before the intelligentsia and to drink everybody under the table at a convivial gathering at the Cliff House.

Apparently everybody does come to, or at least head toward San Francisco. Kipling came here as an unknown newspaperman. O. Henry crossed our waterfront on his way from Honduras to serve a sentence in prison. Schliemann was here in 1850, years before he dreamed of discovering Troy. The great Steinmetz was on his way here to live with relatives when he happened to stop off at Schenectady and changed the course of his own life and of the General Electric Company. And the lawyers are coming in July!

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

Why Such Divergent Views as to Discipline?

IT is often interesting to note the wide difference of view held by the different bodies that deal with a case in which no facts are in dispute, as to the discipline that is required when an attorney has been guilty of professional misconduct. Local bodies generally appear to be more lenient than those not composed entirely of local lawyers, and Supreme Courts, so generally as to make it noticeable, do not impose as serious discipline as non-local lawyer bodies believe to be required. It is easy to understand why a local lawyer hesitates to initiate disciplinary proceedings against a member of his own bar. Unless the misconduct in some way affects the interest of a client, he is unlikely to feel that he has any special duty. The almost certain ill-will of the lawyer and his friends is practically a guarantee against initiatory action. These same considerations often appear to produce undue leniency of decision when local proceedings have been initiated by others. The non-local lawyer, dealing with the same facts and being uninfluenced by considerations that generally affect the local lawyer, favors more serious discipline. This attitude generally appears to be required by the protection that is due the public. But it is not clear why a Supreme Court should so often reduce the discipline that lawyers deem requisite. Can it be that courts are less sensitive to their duty to protect the public than are lawyers? Are lawyers generally less qualified to judge what the public's protection requires than are the courts?

A recent California case (Hall v. State Bar of California, 85 P. 2d 870, 871) interestingly illustrates the differing views held by such bodies as are referred to above. It appeared that Zimmer, the owner of a cafe, had consulted Feinstein "to obtain legal services and a loan of money."

The report states:

"Feinstein lent him about $300 and incorporated the business. In return for this assistance he was to receive a share in the net profits.

"In January, 1937, Zimmer came to Feinstein for further aid, and a plan was devised and carried out whereby Feinstein drew checks to third parties, which Zimmer discounted to obtain money. Feinstein had no sufficient funds to cover such checks, and Zimmer undertook to cover them with cash deposits at the time they cleared. Later Feinstein gave Zimmer the names of Morgan, a former client, and petitioner Hall, Feinstein's office assistant, as other prospects for these 'loans,' and Zimmer was successful in inducing them to go through the same procedure, for a money consideration.

"Hall wrote five checks, two on his own 'trust account' for a total of $950, and three on the account of Acme

Collectors, a client, for a total of $975. The first two were made payable to Feinstein and the other three to Zimmer. Hall owed nothing to either payee and fully understood that the checks were to be used by Zimmer to obtain money from third persons. The accounts on which the checks were drawn contained only a few dollars, and, of course, Hall had no authority from his client to use its account for this purpose. Hall, following Feinstein's procedure, struck the word 'order' from the checks, to destroy their negotiabilty. At Zimmer's suggestion, Hall dressed up the checks to make them look legitimate by making fictitious notations in the upper left-hand corner, such as '% of collection $325.00,' '½ fee $475.00,' and 'Hamel & Jordan, ½ fee $475.00.' For his efforts Hall was to receive $50, and Zimmer gave him a check for that sum, which was never paid."

Both Zimmer and Feinstein were prosecuted and convicted. A local administrative committee recommended that Feinstein be disbarred and Hall publicly reprimanded. The Board of Governors recommended that both be disbarred. Upon application for a review of the Board's recommendation it was held that Hall be suspended for three years. The Court said:

"From the foregoing review of the facts it is clear that Hall was guilty of the same fraudulent practices as Feinstein, and the legal administrative committee found that both were guilty of acts involving moral turpitude. Moreover, the entry of the fictitious transactions on the face of the checks shows a full knowledge of their intended fraudulent use, and a deliberate purpose to aid in the deception of the contemplated victims. And it should further be remembered that Hall was to receive payment for these 'loans,' and did get the one check of $50 for Zimmer.

"Hall does not deny the substance of the charges against him, and frankly admits that his conduct was 'foolish and unwise' and that he is 'ashamed' of his part in the transaction. But he asserts that he had no intention of injuring anyone, and that he honestly believed, from the statements of Feinstein and Zimmer, that the checks would be paid. In brief, his main defense is his youth, inexperience, and faith in his friend and employer, Feinstein. This defense is well stated in the following findings of the local administrative committee:

" 'After January 29, 1937, which was the date of the last of the aforesaid five checks given by Morgan to Zimmer, Zimmer again called upon Feinstein to inquire if he, Feinstein knew of any other person that would be willing to enter into similar check transactions: Fenstein then introduced Zimmer to respondent Hall. For several years prior thereto Hall had been acquainted with Feinstein, who had befriended Hall personally by advancing him money for the necessities of life and professionally by giving Hall legal employment as process server while Hall was studying law, and later by giving him office space in Feinstein's law suite; for these favors Hall had a deep and genuine sense of obligation to Feinstein, which Feinstein knew. Moreover Hall was immature in judgment and inexperienced in the practice of law, having then practiced less than three years, and of this Feinstein was likewise aware. In fact, the combination of Hall's immaturity, inexperience and his sense of obligation, made Hall a tool in the hands of Feinstein; consequently, Feinstein's introduction of Zimmer to Hall made Hall pliant and acquiescent to Zimmer's request for checks to be used in transactions similar to the ones previously had between Zimmer and Feinstein and Zimmer and Morgan.'

"Our problem is therefore not one of law: we are called upon to determine what is the proper measure of punishment for a clearly improper act. Whatever the motives may have been, the acts were not slight infractions of rules of ethics, but were deliberate and intentionally fraudulent acts involving moral turpitude. This being so, we cannot agree with the local committee that a reprimand is a sufficient punishment. But where the extreme penalty of disbarment is invoked, we think it proper to take into consideration the youth of petitioner and the circumstances in which he was placed by his close association with Feinstein. Hall was but 33 years of age, and in practice less than three years. It is no excuse that he followed the suggestions of Feinstein, but this fact distinguished him in some degree from an experienced and calculating offender.

"In short, we believe that it is still possible for Hall to redeem himself if permitted to return to practice, and that disbarment is not the appropriate penalty under all the circmustances. In this view we are supported by the local committee and by four members of the board of governors who felt that the punishment was too severe. After careful deliberation we have concluded that a substantial period of suspension is adequate punishment for petitioner's offense."

It is interesting to note that the court refers to its judgment as "punishment" and astonishing that it refers to a man 33 years old as a youth. Why do courts have so much more faith in the reform of middle aged unethical lawyers than do lawyers themselves?

The Use of Professional Cards by Lawyers

In 1937, Canon 27 of the Canons of Professional Ethics of the American Bar Association, which deals with advertising, direct or indirect, was rewritten. As to professional cards, it formerly provided: "The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper." Canon 27 now provides only that "The customary use of professional cards is permissible." The Committee on Professional Ethics and Grievances has construed this provision not to permit publication of such cards.

A recent case arose in Nevada in which an attorney was charged with distribution of his professional cards for the purpose of soliciting professional employment by placing a supply of them in a hotel lobby in violation of the Rules of Professional Conduct of the State Bar Act. Rule II originally provided as follows:

"A member of the state bar shall not solicit professional employment by advertisement, or otherwise. This rule shall not apply to the publication or use of ordinary professional cards, or to conventional listings in legal directories."

The foregoing rule was amended in 1936 to read as follows:

"A member of the state bar shall not solicit professional employment by advertisement, or otherwise. This rule shall not apply to conventional listings in legal directories, nor to the publication or use of ordinary professional cards, but shall be construed to prohibit the circulation of such cards by making the same directly or indirectly available to others than the persons with whom the attorney is in personal contact."

It is interesting to note that this requirement prohibits an attorney's making such cards directly or indirectly available to persons with whom the attorney is not in personal contact and yet appears to permit the attorney's handing his card directly to any person. If an attorney should come to a scene where a personal injury occurred and should hand his professional card to one of the persons involved in the accident, it would seem as least arguable that his conduct would not violate the amended rule, though it is clear that it would violate amended Canon 27.

The Court was clear that a lawyer's placing his cards in a hotel lobby was a violation of the amended rule, but held the lawyer blameless because the amendment had not been published when the cards were placed in the hotel lobby. In re Ames, 85 P. 2d, 1014.

HERSCHEL W. ARANT, Chairman
Committee on Professional Ethics and Grievances.

TAXATION OF TAX-EXEMPT SECURITIES

Since Ratification of Sixteenth Amendment the Courts Have Steadily Declared That Its Sole Effect Is to Permit Congress to Levy an Income Tax, Free from Requirement of Apportionment among the States, and That It Was Not Intended to Extend the Taxing Power to New or Previously Excepted Subjects—Amendment Subject to Implied Limitation That Congress Can Levy Taxes Only on Persons and Things within Its Taxing Jurisdiction and States Have Never Been within That Jurisdiction—Must Be Read in Connection with Entire Document—Bizarre Consequences of Contrary View*

By David M. Wood
Member of the New York Bar

INVESTORS throughout the country have become somewhat upset regarding the proposal of the Federal Government to levy taxes upon the income derived from State and municipal bonds. Indeed, the States themselves have become so concerned about it that they have organized a nation-wide association, which, I am informed, has been joined by forty States, to protect themselves against this threatened invasion of their sovereign rights. This concern would seem to be justified, for the President of the United States, in a message to Congress, has suggested that Congress should enact a statute levying taxes upon the income derived from State and municipal bonds thereafter issued, and the Department of Justice has prepared and published an elaborate brief purporting to sustain the constitutionality of such legislation. The investors are disturbed because they fear that, nothwithstanding the assurances of the Federal Government that it is proposed to levy such taxes only upon the income derived from bonds thereafter issued, it actually proposes, or will, in the not far distant future, propose, to tax the income derived from State and municipal bonds now outstanding. Whether there is any justification for this lack of confidence in the assurances of the Government is a question upon which there may be a difference of opinion, but that such lack of confidence exists can hardly be disputed. The investor is convinced that if the power of Congress to levy taxes upon the income derived from future issues of State and municipal bonds were once established, some argument to justify the taxation of income derived from bonds now outstanding would soon be advanced.

The States are concerned about the proposal because they see in it an encroachment upon the rights of the States, which would have very far-reaching consequences. Its initial effect would, no doubt, be to increase slightly the revenues of the Federal Government, but would do so at the expense of the local taxpayer. The Federal tax would be reflected in higher interest rates upon the bonds, issued by the States and their municipalities, and this increase in the interest rate would result in increasing the tax burden of citizens of the States and municipalities issuing the bonds. But the problem has still more serious consequences for the States, to which I will refer later.

The question is frequently asked, what provision of the Federal Constitution deprives Congress of the power to tax the income derived from State and municipal bonds? There is no express declaration to that effect in the Constitution, but the taxing power of any Government only extends to properties and persons subject to its jurisdiction. The authors of the Constitution created a federated republic, composed, originally, of thirteen sovereign States. To the National Government the States delegated certain powers and reserved all other powers to themselves, or to the people. It was never intended to make the States completely subordinate to the United States. The States reserved to themselves all the attributes of sovereignty which they did not delegate to the Federal Government. Consequently the States and their instrumentalities of Government were never subject to the taxing jurisdiction of the United States.

On the other hand the United States was not intended to be subordinate to the States, and, accordingly, the Supreme Court of the United States held, very early in the history of this country, that the United States and its instrumentalities of government were not subject to the taxing jurisdiction of the States. From the time the Supreme Court of the United States decided the famous case of McCulloch v. Maryland, down to the present time, this system of dual sovereignties has been recognized by the courts, and the courts have held that the States cannot tax the United States or any of its instrumentalities or bond issues, and, conversely, the Federal Government cannot tax the States or any of their instrumentalities or bond issues. The reason bond issues are included in the exemption is because they are merely the evidence of the exercise of a sovereign power of government—the contracting power, and to levy a tax upon the bonds is, in effect, to tax the power itself.

In 1894 Congress enacted an income tax law. The constitutionality of that law was questioned in the case of Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; 158 U. S. 601. The Supreme Court held the act unconstitutional. That decision resulted in the adoption of the Sixteenth Amendment to the Federal Constitution. The amendment reads as follows:

"The Congress shall have power to lay and collect

*Address delivered at the convention of the Investment Bankers' Association of America at White Sulphur Springs, West Va., Oct. 26, 1938.

taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Since the ratification of the amendment, the courts have steadily declared that its sole effect is to permit Congress to levy an income tax, free from the requirement of an apportionment of the levy among the States according to their populations, determined by the last Federal Census, and that it was not intended to extend the taxing power of Congress to new or previously excepted subjects. Conforming to these decisions, the Supreme Court of the United States held, in the case of National Life Insurance Co. v. United States, 277 U. S. 508, that, notwithstanding the Sixteenth Amendment, a tax upon the income derived from State and municipal bonds is unconstitutional. In effect, the Court has held that the Sixteenth Amendment must be read in connection with the entire Constitution and that it was not intended as a new grant of power, which might be exercised by Congress without regard to the other provisions of the Constitution in which it was incorporated but was intended merely to avoid the necessity of apportioning an income tax among the States according to their populations, as the Constitution had previously required. This interpretation of the Sixteenth Amendment has been steadily adhered to by the Supreme Court of the United States, in many decisions, since it was first called upon to construe the Sixteenth Amendment.

The Department of Justice now contends that the Sixteenth Amendment must be interpreted as a new grant of taxing power, not subject to constitutional limitations theretofore imposed upon the taxing power, that it conferred upon the Federal Government power to levy taxes upon subjects which previously were not within the scope of its taxing power. It is admitted that the courts have consistently held that this is not a correct interpretation of the amendment, but it is contended that these decisions are erroneous and were rendered without a consideration of all of the facts. Let us, therefore, examine the facts.

Prior to the ratification of the Sixteenth Amendment, Congress, unquestionably, possessed the power to levy an income tax. This taxing power was plenary and embraced all conceivable forms of income taxes, but the Federal Constitution contained two important limitations upon its exercise. One was that direct taxes must be apportioned among the States in proportion to their population, determined by the last Federal Census, and the other was, that taxes other than direct taxes, must be levied uniformly throughout the United States. This latter limitation did not preclude the possibility of classification of persons and properties for taxation, but merely required geographical uniformity of the tax levied upon any class of property or persons.

What, then, was the necessity for the enactment of the Sixteenth Amendment? The reason was, the Supreme Court had held in the case of Pollock v. Farmers' Loan & Trust Company, that a tax levied upon the income derived from real estate or personal property, was a direct tax which required apportionment among the States, as the Constitution required. In fact, the Court held three things in the Pollock case:

(1) That a tax levied upon incomes derived from businesses, professions, etc., was not a direct tax and might be levied by Congress without an apportionment, but, of course, subject to the other constitutional limitation, that it be levied uniformly throughout the country;

(2) That a tax levied upon incomes derived from real or personal property was a direct tax, which was subject to the requirement of apportionment; and

(3) That under no circumstances, whether the tax was apportioned or levied uniformly throughout the country, could a tax be levied upon the income derived from State and municipal bonds.

Because this decision rendered impracticable the levy of a tax upon incomes derived from invested capital, President Taft recommended to Congress the enactment of a constitutional amendment to authorize the levy of an income tax, free from the requirement of apportionment. The amendment was passed by both branches of Congress with comparatively little debate, and at no time prior to its passage was it suggested by any member of Congress that it would permit the levy of taxes upon the income derived from State and municipal bonds. All of the debate indicates that what the members of the House and Senate had in mind, was that there were large incomes derived from invested capital, the taxation of which was practically impossible under the existing Constitution. Thus we find members of Congress referring to the enormous investment of Andrew Carnegie in bonds of the United States Steel Corporation, and the large income which he derived from that investment, free from all Federal taxation. It was not until Governor Hughes of New York expressed the view that the language of the amendment was such as to confer upon Congress the power to tax State and municipal bonds, that we find any consideration given to this very important point.

Thereupon, this question was greatly agitated in the public press, and it resulted in Senator Borah delivering a speech from the floor of the Senate, in which with great ability, he analyzed the taxing powers of the Federal Government, and declared that the amendment would not have the effect which Governor Hughes feared. Senator Bailey said that he had voted for the amendment, believing that it would have no such effect, and Senator Brown, who had introduced the amendment, stated on the floor of the Senate and elsewhere in public speeches, that he did not concur in Governor Hughes' fears. Elihu Root, then Senator from New York, expressed a similar opinion, and a careful search of the Congressional Record fails to disclose any opinion to the contrary expressed on the floor of the House or Senate by any member of Congress.

Several public men of the time shared Governor Hughes' fears, but many others of equal prominence differed with him, and many text-writers denied that the amendment had any such effect. Among these was Professor Seligman of Columbia University, a noted authority upon the subject of taxation.

Summarizing the facts we find that while the amendment was pending before the States, no member of Congress appears to have stated upon the floor of either House that the amendment, in his opinion, would authorize the taxation of the income derived from State or municipal bonds, but that among public officials, lawyers and text-writers, there was a difference of opinion upon the subject.

In determining what was the purpose of Congress and of the people of the States, in proposing and ratifying the amendment, it is necessary to consider not only the difficulty which was proposed to be remedied by the amendment, but what would be the consequences of various interpretations of the amendment. The Department of Justice contends that the amendment is

free from ambiguity, and, therefore, there is no room for interpretation; that the words "from whatever source derived" mean exactly what they say and authorize Congress to tax the income of any person, corporation or other entity. But a moment's reflection will show that there are certain incomes, which, obviously, were not intended to be included within its scope—that there are certain inherent limitations upon the scope of this so-called unambiguous language. Obviously, Congress could tax incomes under this amendment only if the person to whom the income accrued, or the property or business from which the income was derived, was subject to jurisdiction of the United States. It certainly would not be contended that it gave Congress the power to levy taxes upon salaries and incomes wholly without the jurisdiction of the United States. Would it be contended that Congress could levy a tax upon the income earned by a foreigner prior to the time he came to this country and became a naturalized citizen? Was it intended to authorize Congress to levy a tax upon the income of a foreign visitor? Was it intended to apply to the salary of an ambassador accredited to this country by a foreign government? In short, the amendment is subject to the implied limitation that Congress can levy taxes only upon persons, properties and business subject to its taxing jurisdiction.

But the States have never been subject to the taxing jurisdiction of Congress. The States are independent sovereignties. In Ohio Life Insurance & Trust Co. v. DeBolt, 16 How. 230, the Supreme Court of the United States said:

"It will be admitted on all hands that with the exception of the power surrendered by the Constitution of the United States, the people of the several States are absolutely and unconditionally sovereign within their respective territories."

This has been constantly reiterated by the Supreme Court of the United States. It is because a State is sovereign, that it may not be sued without its consent. However inconvenient it may now seem to the National Government, the obstinate facts are, that the Constitution of the United States did not create a highly centralized national government, but, on the contrary, created a federal union of sovereign States and delegated to the National Government certain powers only. Those powers which were not delegated to the Federal Government, in the language of the Constitution itself, "are reserved to the States respectively, or to the people." To say that a sovereign is a subject of taxation by another sovereign is a contradiction of terms. The authors of the Constitution of the United States would have been amazed at the assertion of any such power on the part of the Federal Government.

The States, therefore, are not, and never were, within the scope of the taxing power of Congress, for the same reason that an ambassador, accredited by a foreign country to this country, is not subject to such taxing power. The ambassador is the representative of his sovereign, and international law has always recognized, for that reason, the immunity of an ambassador from control by the country to which he is accredited, whether through the exercise of the taxing power, or otherwise. The States are themselves sovereignties, and likewise are not subjects of taxation by the Federal Government. Prior to the ratification of the Sixteenth Amendment, the Supreme Court of the United States had held Congress possessed no power to tax the States or the instrumentalities through which they exercise their sovereign powers, not because there was any express declaration to that effect in the Federal Constitution, but because such taxation was incompatible with the system of dual sovereignties which the Constitution established. The Sixteenth Amendment made no change in this situation, and it must be construed merely as authorizing Congress to levy an income tax, without the necessity of an apportionment, upon such subjects of taxation as are within the taxing jurisdiction of Congress.

If the contention of the Department of Justice is correct and the Sixteenth Amendment amounts to a new grant of taxing power not subject to the limitations imposed by other provisions of the Constitution, it has some very curious results which it is difficult to believe Congress could have intended. None of these consequences was discussed or ever hinted at in the debate upon the adoption of the joint resolution proposing the amendment, and the consequences of such an interpretation of the amendment are so far-reaching and so destructive of the system of government which the Constitution established, that it is hard to believe that, had Congress intended them, it would have passed the amendment with so little debate. A consideration of the consequences of this interpretation of the amendment is, therefore, in order, as it may throw considerable light upon the intention of Congress and of the people in proposing and ratifying the amendment.

The Supreme Court held, in the Pollock case, that a tax levied upon the income derived from real or personal property was a direct tax, consequently, subject to the rule of apportionment. If the Sixteenth Amendment, however, be considered as a grant of a new power to Congress, then it authorizes a levy of a direct tax without the necessity for apportioning it among the States. At the same time it is not subject to the rule of uniformity, as that rule does not apply to direct taxes. It is, therefore, subject to no limitation. Under that interpretation of the Sixteenth Amendment, Congress would possess the power to levy a tax upon incomes derived from invested property subject neither to the rule of apportionment, nor to the rule of uniformity. The result would be that Congress would possess the power to levy income taxes of this character at different rates in the different States. It could tax incomes, derived from invested property, at one rate in New York, and in Nevada, at another rate. This was pointed out by Chief Justice White in an opinion rendered for a unanimous Court in Brushaber v. Union Pacific R. R., 240 U. S. 1, at page 12.

The power to tax is the power to destroy. Chief Justice Marshall so declared more than one hundred years ago, and it is a generally accepted truth. It is true that some Judges in dicta, notably Justice Holmes, have disputed this proposition, usually in dissenting opinions, but even Justice Holmes in writing the opinion for the Court, in St. Louis Poster Co. v. United States, 249 U. S. 272, declared that a municipality could exercise its taxing power to tax bill boards out of existence. In fact the taxing power has been used by the States, and even by Congress on more than one occasion, for the purpose of destruction. Under the Department of Justice's interpretation of the Sixteenth Amendment, therefore, it would be possible for Congress to tax out of existence invested capital throughout the entire country, or, there being no limitations upon the exercise of the taxing power, which it contends was vested in Congress by the Sixteenth Amendment, to select the States in which invested capital should be taxed out of existence. Can we believe that

Congress, in proposing the Sixteenth Amendment, or the people in ratifying it, contemplated anything of the sort?

Moreover, if the Sixteenth Amendment is such a new grant of power, and the words "from whatever source derived" were not intended merely to dispose of the difficulty presented by the decision of the Supreme Court in the Pollock case, but are to be construed as extending the taxing power of Congress to subjects of taxation not theretofore within the scope of the Federal taxing power, then it follows that Congress may tax the income of the States, or of their municipalities. The Department of Justice apparently takes that very position. The interpretation for which the Department contends, forces one inevitably to that conclusion, because the States and their municipalities have incomes and under that interpretation of the effect of the Sixteenth Amendment, the origin of the incomes, or the persons possessing them, is immaterial. Under that interpretation of the Sixteenth Amendment, the governmental or sovereign capacity of the taxpayer is likewise immaterial, for the moment it is admitted that the character of the States or of their municipalities has any bearing upon the validity of the tax, the whole argument made to sustain the interpretation contended for, breaks down completely. It is for that very reason that the Department has gone to such pains in an attempt to demonstrate that all of the decisions of the Supreme Court of the United States, prior to the Sixteenth amendment, denying Congress the power to tax the States or their instrumentalities, are erroneous. It was forced to take such a position, for it was realized that its contentions regarding the interpretation of the Sixteenth Amendment were otherwise untenable.

Moreover, under the interpretation of the Sixteenth Amendment, asserted by the Department of Justice, Congress would possess the power to levy taxes upon the incomes of all judicial officers of the Federal Government and of the States. These officers might be classified as a class of taxpayers, and rates of taxation assessed upon their incomes different from those assessed upon other classes of taxpayers. Congress has for many years classified taxpayers for income tax purposes, and has assessed against certain classes rates of taxation differing from those assessed against other classes of taxpayers, and this power has been sustained by the courts. It would be within the power of Congress, therefore, to so exercise the taxing power against judicial officers of the country as to make them subservient to Congress, and what is even more dangerous, when Congress is dominated by the Executive, to make the Judiciary subservient to the Executive branch of the Federal Government.

This interpretation of the Sixteenth Amendment would result in conferring upon Congress a power which could be used not only to destroy the States, but also to destroy the independence of the Judiciary. States which did not conform to the will of the Federal Government could be forced into line by the levy, in those States, of taxes upon the incomes of its citizens at higher rates than those levied upon citizens of States which were subservient to the Federal Government, and if that were not sufficient, discriminatory taxes might be levied upon their bonds and upon the bonds of their municipalities, or even upon their tax revenues, until they came to terms. The Federal Government would be in a position completely to control the finances of the States and of their municipalities, and through the exercise of this power no State would be able to exercise any of its reserved powers without the approval of the Federal Government. The States would become as completely subject to the control of the Federal Government as a county is now subject to control by the State which created it. The States would cease to be sovereignties and would become mere geographical subdivisions, existing at the will and for the convenience of the Federal Government.

The independent judiciaries, State and Federal, which have been so carefully set up, could be destroyed over night. The authors of the Constitution were well aware that no judiciary can be independent when its compensation is subject to diminishment by either the Legislative or Executive branch of the Federal Government. For that reason, Article III, Section 1, of the Federal Constitution carefully provided that the compensation of Judges should "not be diminished during their continuance in office." Can any one believe that the people of this country in ratifying the Sixteenth Amendment intended such a revolutionary change in the structure of the American Government?

The conclusions, which the Department of Justice seems to have reached, regarding the effect of the Sixteenth Amendment, seem to be due to a failure to realize that the amendment, upon its ratification, became a part of the existing Constitution and must be read in connection with that entire document. That is exactly what the Supreme Court of the United States has done in interpreting the amendment in the various cases which have come before it since its ratification. It was obliged to hold, for instance, that the intent of Congress and the people in proposing and ratifying the amendment, was merely to transfer taxes upon income derived from invested property, from the class of direct taxes to the class of excises, so as to subject these taxes to the rule of uniformity applicable to excises, and thus avoid the absurdity of assuming that it was intended to confer upon Congress a power to levy income taxes at different rates in different States. Similarly, the Court has held that the amendment is subject to the constitutional prohibition against reducing compensation of a judicial officer during his term of office, and, for the same reasons, it has held that the amendment did not confer upon Congress the power to tax incomes derived from State and municipal bonds. In short, the Court has held that neither Congress, nor the people, intended by the ratification of an obscurely worded amendment, to destroy limitations upon the powers of the Federal Government, which are expressly provided for in the Constitution, or necessarily implied and which are essential for the preservation of the very form of government which the Constitution was intended to establish.

The Constitution provided for an indestructible union of indestructible States. Whenever the people decide to change that form of government, they can do so by amending the Constitution, but the amendment will have to so provide expressly, for no court will be justified in assuming the people intended a revolutionary change in the structure of government, unless their intention was unmistakably expressed. No court would be justified in assuming the people intended to abandon fundamental concepts upon which the United States was founded, because, in an amendment relating to taxation, is to be found the obscure phrase "from whatever source derived."

LEGAL ASPECTS OF TAX-EXEMPT PRIVILEGES

Doctrine of Implied Limitations on the Taxing Powers of the Federal Government and the States Adopted Mainly as Result of a Misinterpretation of Opinion in McCulloch vs. Maryland —What That Case Decided—Implied Immunity Now Assumed to Be Reciprocal because of Decision in Collector vs. Day—Significance of Helvering vs. Gerhardt as Suggesting That Court May Be Prepared to Reconsider and, if Necessary, Restrict Immunity from Federal Income Tax—Scope of Judicially Created Doctrine Already Vitally Restricted by Certain Limitations—Pertinent Cases, etc.*

By J. P. Wenchel
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HOW did our American doctrine, which denies to one government, National or State, the power to tax instrumentalities of the other come about, and what is the true scope of it?

It is a singular fact that the Federal Constitution does not limit in express terms the power to tax the property or profits or obligations of any State government. It is also a singular fact that State constitutions do not limit in express terms the power to tax the property or profits or obligations of the Federal government or of the government of any sister State.

The doctrine of reciprocal immunity is wholly inferential. Neither in the Federal Constitution nor in any State constitution is language used from which such immunity must clearly be implied.

To the extent that this remarkable doctrine rests upon the theory of sovereignty, it is not upon a very firm foundation. If a subject of taxation is within the taxing power of a sovereign, that sovereign has full power to tax it. The power to tax is one of the attributes of sovereignty; and the jurisdiction to exercise the power is coterminous with the bounds of the sovereign's jurisdiction. Hence, it was early held that one State may tax the securities of another State. [*Bonaparte v. Tax Court,* (1881) 14 Otto (U. S.) 592.]

How did we come then to adopt this doctrine of implied limitations upon the taxing powers of the Federal Government and the States? Mainly as the result of a misinterpretation of the famous opinion of Chief Justice Marshall in *McCulloch v. Maryland.* [(1918) 4 Wheat. (U. S.) 316.] In that case a unanimous court held that a Maryland stamp tax on notes issued by the Bank of the United States was invalid because it was a tax upon an instrumentality of the National government.

The tax was discriminatory, although no stress was laid on this fact in the opinion. Marshall conceded that Maryland had power to tax the real estate of the Bank and the interest of Maryland citizens in the institution "in common with other property of the same description throughout the State." Marshall feared, however, that if a direct tax could be levied by a State on the operations of a federal instrumentality, the authority of the National government might be seriously impaired.

Marshall plainly declared he was not afraid of the effect of Federal taxation upon a State instrumentality because "the people of all the States, and the States themselves, are represented in Congress and, by their representatives, exercise this power." But he fully recognized the peril in permitting a State to levy a direct and discriminatory tax upon a function of the Federal government. Consequently Marshall blocked at the threshold the exercise of the State's sovereign power to tax a "means employed by Congress to carry into execution powers conferred on that body by the people of the United States."

It is noteworthy that this newly announced principle of implied immunity of the Federal government from direct taxation by the States was not accepted without some doubt and reservations. Ten years after *McCulloch v. Maryland,* two justices dissented in the case of *Weston v. Charleston* [(1829) 2 Pet. (U. S.) (p. 473) 449], on the ground that the decision in the McCulloch case held nothing more than that no "law professing to tax, will be permitted to destroy." But Marshall and three other justices treated the tax in question as a direct personal property tax upon Federal obligations and held it invalid.

Here, as in *McCulloch v. Maryland,* the tax was not only direct but also discriminatory. It was not imposed upon all property, but only upon certain types, among which "six and seven per cent stock of the United States" was included but from which obligations of the State of South Carolina or of the City of Charleston were excluded.

In 1842, after Marshall's time, the Court was again unanimous in holding in *Dobbins v. Commissioners of Erie County* [(1842) 16 Pet. (U. S.) 435] that a Federal revenue officer could not be subjected to a State tax imposed on "all offices and posts of profit." The Court held, first, that the State taxing statute conflicted with the Federal statute which fixed the compensation of the revenue officer and conferred upon him the right to receive such compensation when earned, and, second, that "any law of a State imposing such a tax cannot be constitutional, because it conflicts with a law of Congress made in pursuance of the Constitution, and which makes it the supreme law of the land."

Again the basis of the immunity is made the superior authority of the Federal government. Again the tax is a direct tax of a type now obsolete—a so-called

*Address delivered before the Federal Bar Association, Washington, D. C., on May 25, 1938.

faculty tax levied on the assessed value of the office.

The tax in the Dobbins case cannot be said, however, to have been discriminatory against Federal officers. It applied not only to all professions, trades and occupations but also to idle bachelors over twenty-one years of age! Nor was there any discrimination against Federal securities present in the case of *Bank of Commerce v. New York City* [(1862) 2 Black (U. S.) 620] twenty years after the Dobbins case. The court held, nevertheless, that a municipal capital stock tax on a bank could not be applied unless the capital invested in Federal securities was first excluded from the assessment.

Whether the fact that the case came before the Supreme Court during the second year of the Civil War when banks needed encouragement to invest in Federal bonds might have influenced the decision is not as important as the fact that three years after the Civil War the Court, in the case of *Society for Savings v. Coite* [(1868) 6 Wall. (U. S.) 594], upheld a State corporate excise tax upon a bank measured by all its assets, including Federal bonds.

The difference between the two cases is the difference between a direct property tax, and an indirect excise tax. This difference may appear artificial, but it furnishes a convenient and fundamentally sound test for determining the boundaries of the doctrine of reciprocal immunity from taxation.

This distinction seems to have been recognized as early as the case of *United States v. Railroad Company* [(1872) 17 Wall. (U. S.) 322]. There the Baltimore and Ohio Railroad had refused to pay a five per cent withholding tax on the amount of interest due upon bonds issued by the Railroad to the City of Baltimore in return for money loaned by the City. The Supreme Court held that since the tax was a tax upon the creditor, and not upon the debtor, it was a tax upon the revenues of the City of Baltimore and hence could not be collected. The Court said "the revenue must be municipal in its nature to entitle it to the exemption claimed."

The approach of the Court implies that if the situation had been reversed and the City had been the debtor on the bonds, charged with the duty of withholding the tax on the interest due to the Railroad, the tax would have been valid. "The burden falls on the creditor. He is the party taxed," says the Court.

In the usual case, it is the City which is the debtor. The proposed legislation to end tax-exempt securities will apply only to the City's creditor. Hence, the income of a private creditor will be taxed, and not the income of a State or municipality. The tax is directly upon the creditors, and so is the burden. There is a strong basis for the belief that the Supreme Court which decided *United States v. Railroad Co.* would have upheld a withholding tax upon interest levied against the City of Baltimore, if the City had been the debtor and the B. & O. Railroad had held bonds issued by the City.

Earlier, when Marshall had said that "the power to tax involves the power to destroy," and that "questions of power do not depend on the degree to which it may be exercised," he spoke of a direct tax upon the property or obligations of the Federal government or one of its instrumentalities.

The doctrine of implied immunity is now assumed to be reciprocal primarily as the result of the decision of the Supreme Court in *Collector v. Day* [(1871) 11 Wall. (U. S.) 113]. In that case the majority of the Court ignored the distinction which Marshall himself had made and held that the salary of a Massachusetts judge was exempt from Federal tax. Suddenly it had been discovered that the fathers had written into the Constitution the mandate: "What is sauce for the goose is sauce for the gander."

The day before yesterday the Court in its far-reaching opinion in *Helvering v. Gerhardt* held that the federal income tax imposed on salaries received by employees of the Port of New York Authority did not place an unconstitutional burden on the States of New York and New Jersey.

The Court said that the "State immunity from the national taxing power, when recognized in *Collector v. Day* . . . was narrowly limited to a State judicial officer engaged in the performance of a function which pertained to State governments at the time the Constitution was adopted, without which no State could long preserve its existence."

"The basis upon which constitutional tax immunity of a State has been supported," said Mr. Justice Stone, speaking for the Court, "is the protection which it affords to the continued existence of the State. To attain that end it is not ordinarily necessary to confer on the State a competitive advantage over private persons in carrying on the operations of its government. There is no such necessity here, and the resulting impairment of the federal power to tax argues against the advantage. The State and National Governments must coexist. Each must be supported by taxation of those who are citizens of both. The mere fact that the economic burden of such taxes may be passed on to a State government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power."

It may reasonably be assumed that the Court is prepared to reconsider and if necessary restrict immunity from Federal income tax. As a matter of fact the opinion of Mr. Justice Stone considered in its entirety warrants the belief that the Court recognizes the pressing necessity for a re-examination of the whole doctrine of reciprocal immunity. The opinion reiterates Marshall's reference to the creation of the national government by the people of all the States who exercise the national taxing power through their representation in Congress. If Congress enacts the "short and simple statute" suggested by the President, the very fact that the people are taxing themselves "serves to guard against its abuse through the possibility of resort to the usual processes of political action which provides a readier and more adaptable means than any which courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of State action, on the other."

Part and parcel of the doctrine of reciprocal immunity from taxation are two limitations. Even though the tax be direct, the immunity does not extend to all branches of a government. When a State steps down from the dais of a sovereign to joust in the commercial arena of private enterprise, a direct Federal tax on the property or profits of the state business will be upheld. [*South Carolina v. U. S.* (1905), 199 U. S. 437.] This restriction of reciprocal immunity, by what may be called the Proprietary Limitation, emphasizes the artificial, though utilitarian, character of the immunity

against direct taxation with which the Supreme Court has clothed the Federal and State governments in so-called sovereign spheres.

Captain Dobbins is exempt and Judge Day is exempt, but not the sovereign State of South Carolina when it opens public dispensaries for distilled spirits in an attempt to regulate the liquor traffic.

There is another limitation upon the doctrine of reciprocal immunity from taxation. An indirect tax is condemned by the judiciary only when it discriminates against the National or a State government, or substantially burdens its instrumentalities or obligations. Cases decided by the Supreme Court at its present term definitely establish the principle that the Court will apply a pragmatic test when the tax imposed by one government falls only indirectly upon the other government. The Burden Limitation, as this second limitation may be termed, emphasizes a practical perspective where the tax is indirect as distinguished from a doctrinal dogmatism where the tax is direct.

In the case of *James v. Dravo Contracting Co.*, decided during the present term [(1937) 302 U. S. 134], the Court upheld the application of a West Virginia gross receipts tax to a contractor engaged in building locks and dams for the Federal government in West Virginia. It was assumed by the Court that the tendency of such a tax would be to increase the cost of the work, but, declared Chief Justice Hughes, "that fact would not invalidate the tax." The effort of the Supreme Court would be, said the Chief Justice, "in this difficult field to apply the practical criterion," and he concluded that since the tax was nondiscriminatory and did not "interfere in any substantial way with the performance of Federal functions," it was a valid exaction.

And in the case of *Helvering v. Mountain Producers Corporation*, also decided during the present term [(1938) 58 Sup. Ct. 623], the Supreme Court overruled two prior decisions, one as recent as 1932, and held that the income received by a lessee or his beneficiary under a lease from the State of Wyoming of lands held by the State for school purposes was not exempt from Federal income tax.

The case is important because it furnishes a recent demonstration that the Court, as Mr. Justice Brandeis said in his dissent in one of the cases overruled [*Burnet v. Coronado Oil and Gas Co.* (1932) 285 U. S. 393, 409], "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."

The Mountain Producers Corporation Case is also significant because the grounds of the earlier cases, as well as their conclusions, were overruled. The opinions in the overruled decisions had been based upon the reasoning, first, that the tax upon the income of the lessee was a tax upon the lease and "upon the power to make them, and could be used to destroy the power to make them" and, secondly, that the tax was "a direct hamper" upon the governmental lessor, and for this reason alone was invalid.

Chief Justice Hughes in his opinion rejected both lines of reasoning and pointed out that "where the tax is not in fact laid upon the leases as such, or upon the government's property or interest, but is imposed upon the gains of the lessee, like that laid upon others engaged in similar business enterprises," the question is whether "there is in truth such a direct and substantial interference with the performance of the government's obligation as to require immunity for the lessee's income." The Court was wisely not alarmed by the argument *in terrorem* that the tax might diminish the funds thereafter available to Wyoming for school purposes.

The scope of the judicially created doctrine of reciprocal immunity from taxation has therefore been vitally restricted by the judiciary itself. As we have seen, the Proprietary Limitation has hedged the scope of the doctrine so far as a direct tax is concerned; and the more recently announced Burden Limitation requires the application of a practical criterion to the economic consequences of an indirect levy. The pith of recent decisions is that immunity from a nondiscriminatory indirect tax is not grounded upon theoretical conceptions of impairment of the functions of government but upon substantial interference with the exercise of such functions.

One month ago today the President of the United States transmitted to the Congress a message urging it to put an end to tax exempt securities and salaries. The President recommended the enactment of a "short and simple statute" to achieve this objective. The question such a statute would present is whether the reciprocal tax immunity implied by the Constitution extends to income received by an individual or private corporation simply because such income is derived as interest from Federal, State or municipal securities or as compensation from holding a Federal, State or municipal office. The philosophy of the President's message is that the Constitution does not expressly or by necessary and unavoidable implication establish a privileged class of public creditors or public officers, who though living under the protection of a government, are exempted from bearing its tax burdens.

It is generally recognized that tax-exemption is inconsistent with the graduated income tax and is socially unjust. This is not the forum to consider the mischief of tax-exempt securities and salaries; but it may not be amiss to consider the constitutionality of the proposed remedial legislation.

There is no doubt, of course, that Congress has the power to subject Federal securities and Federal officeholders to taxation by a State which, but for the cloak of the immunity, would have the jurisdiction to tax, just as it has the power to subject shares of stock in national banks to state taxation. [(1865) *Van Allen v. Assessors*, 3 Wall (U. S.) 573.] Since the legislation suggested by the President would give express consent to State taxation of income derived from Federal securities and from Federal offices, the issue is narrowed to the validity of amending the Revenue Act of 1938 to include as income, interest received by State and municipal private bondholders and salaries received by State and municipal office holders.

From the Revenue Act of 1913 to the Revenue Act of 1938, interest received by a taxpayer upon obligations of a State or any political subdivision of a State has been expressly exempted from the income tax. Consequently, the Supreme Court has never been given the opportunity to consider specifically the power of Congress to impose a nondiscriminatory income tax upon interest received from State and municipal bonds since the Sixteenth Amendment, or as a matter of fact since the decision in *Pollock v. Farmers' Loan and Trust Company*. [(1894) 157 U. S. 429; (1895) 158 U. S. 601.]

The decision in *National Life Insurance Co. v. United States* [(1928) 277 U. S. 508] has been frequently cited as authority for the proposition that the

power conferred upon Congress by the Sixteenth Amendment to levy taxes "on income from whatever source derived" does not authorize the application of an income tax to interest received by an individual or private corporation from State or municipal bonds.

But the tax in that case was held to be discriminatory. And neither the majority nor the minority opinions in that case mention the Sixteenth Amendment. As construed by the Supreme Court, the statute required an insurance company holding State and municipal securities to pay more upon its taxable income than could have been demanded if it had been derived solely from taxable securities. The case stands merely for the proposition announced by Mr. Justice McReynolds in the majority opinion that "One may not be subjected to greater burdens upon his taxable property solely because he owns some that is free."

Our review of the cases has shown that the Supreme Court never hesitated before the Sixteenth Amendment, nor has it hesitated since the Sixteenth Amendment, to condemn any tax discriminating against the income from Federal, State or municipal obligations, nor any tax levied as a direct property tax upon such obligations. But such cases holding discriminatory taxes void do not lend support to the view that a non-discriminatory Federal income tax applicable to State and municipal securities violates the principle of reciprocal immunity. Such cases simply hold, as is self-evident, that the Sixteenth Amendment did not repeal the Fifth Amendment.

The Court has, however, drawn a sharp distinction between imposing a burden and conferring a bounty through tax-exemption. Thus, the Court has upheld the Federal income tax as applied to the profits realized from the sale of municipal bonds. [*Willcuts v. Bunn*, (1931) 282 U. S. 216.] And it has had no difficulty in sustaining the application to tax-exempt securities of the Federal estate tax [*Greiner v. Lewellyn*, (1922) 258 U. S. 384], as well as a State inheritance tax law. [*Plummer v. Coler*, (1900) 178 U. S. 115.] Yet in each of these cases the holder of the tax-exempt bonds obtained no advantage over a holder of taxable bonds. And as Chief Justice Waite, writing for a unanimous court in *Bonaparte v. Tax Court* [(1881) 14 Otto (U. S.) 592, 595] said:

"It is true, if a State could protect its securities from taxation everywhere, it might succeed in borrowing money at reduced interest; but, inasmuch as it cannot secure such exemption outside of its own jurisdiction, it is compelled to go into the market as a borrower, subject to the same disabilities in this particular as individuals. While the Constitution of the United States might have been so framed as to afford relief against such a disabiliy, it has not been, and the States are left free to extend the comity which is sought, or not, as they please."

Before the ratification of the Sixteenth Amendment, the Supreme Court [*Flint v. Stone Tracy Co.*, (1910) 220 U. S. 107] had upheld a Federal corporate excise tax which required the inclusion of interest on State and municipal bonds in computing the net income. And since the Sixteenth Amendment the Supreme Court has upheld State excise taxes on corporations measured by net income from all sources, including Federal securities. [*Pacific Co. v. Johnson*, (1932) 285 U. S. 480; *Educational Film Corp. v. Ward*, (1931) 281 U. S. 379.]

These cases all proceed on the theory that the tax in question, whether upon capital stock or an inheritance or a capital gain, is an excise tax, as if an excise tax were classified as something entirely different from an income tax. The reason for this approach is the constant endeavor by the Court to short circuit the decision in the Pollock case.

Prior to the Pollock case, the income tax had generally been considered as an excise tax or a duty; in fact, in *Springer v. United States* [(1880) 12 Otto (U. S.) 586] the Supreme Court squarely ruled that an income tax was not a direct tax within the meaning of the Constitution, and sustained the constitutionality of a general tax upon individual incomes which had been enacted during the Civil War.

In the Pollock case, however, the Court treated the income tax as in effect a direct tax and held that the income from municipal bonds "could not be taxed because of want of power to tax the source."

During the present term, the Court has had occasion again to consider the nature of an income tax. Speaking for a bench divided six to three, Mr. Justice Cardozo, after a review of state decisions, concluded in *Hale v. State Board* [(1937) 302 U. S. 95] that "many, perhaps most, courts hold that a net income tax is to be classified as an excise" and that the decisions of the Supreme Court itself now "forbid us to stigmatize as unreasonable the classification of a tax upon net income as something different from a property tax, if not substantially an excise."

And only ten days ago the Supreme Court upheld, on the authority of the Hale case, the application of an Indiana gross income tax to interest on Indiana State and municipal bonds and recognized the validity of the distinction drawn by the Supreme Court of Indiana, between a tax on the bonds and a tax on the interest on the bonds. [*Adams Manufacturing Company v. Storen* (May 16, 1938) U. S. Law Week, Vol. 5, No. 37, p. 5, 6 (Justice McReynolds dissenting on this point.)]

Last year, the Supreme Court in *People ex rel. Cohn v. Graves* [(1937) 300 U. S. 308] decided that the State of New York could constitutionally tax a resident upon income received from rents of land located in the State of New Jersey. Justices Butler and McReynolds dissented on the ground that the Pollock case had established that a tax on income received for the use of land is in legal effect a tax upon the land itself, and the land was beyond the jurisdiction of the State of New York.

The majority reasoned, however, that neither the privilege of residing in a State and of invoking the protection of its laws, nor the burden of sharing the costs of government apportioned by income tax according to ability to pay, could be affected by the character of the source from which the income is derived. And "for that reason," stated Mr. Justice Stone, "income is not necessarily clothed with the immunity enjoyed by its source." This conclusion is fundamentally inconsistent with the plain statement in the Pollock case that income from municipal bonds could not be taxed because of the immunity of the source of the income.

The repudiation of this much at least of the reasoning in the *Pollock Case* is now complete. On Monday the Supreme Court refused to hear argument upon the question of the constitutionality of the Wisconsin income tax law as applied to income from property located outside of the State and immune from its taxing power.

The principle that income is not constitutionally free from taxation because the source from which it is derived is beyond the taxing power is now established. Thus the taxing power granted to the Federal Govern-

ment by the Constitution may be exercised upon income even though a tax upon the source of that income may preclude or threaten "unreasonably to obstruct any function essential to the continued existence of the state government."

"A Constitution," Mr. Justice Holmes has reminded us, "is not intended to embody a particular economic theory." The Supreme Court has already extricated itself from the legal economics of the Pollock case without looking to the Sixteenth Amendment for legal justification. But should the Sixteenth Amendment be disregarded?

In submitting that Amendment to the Legislature of New York, Chief Justice Hughes, then Governor of that State, warned the Legislature that the words "from whatever source derived" would extend the taxing power to income previously exempt. Senators Borah and Root disagreed with Governor Hughes. Nevertheless, Governor Dix, who succeeded Governor Hughes, urged the Legislature of New York to ratify the Sixteenth Amendment in these words:

"Indeed, it seems to me that if the words 'from whatever source derived' would leave the amendment ambiguous as to its power to tax income from official salaries and from bonds of states and municipalities, the amendment ought to be opposed by whoever adheres to the democratic maxim of equality of laws, equality of privileges, and equality of burdens. . . . It is impossible to conceive of any proposition more unfair and more antagonistic to the American idea of equality and democratic principle of opposition to privilege, than an income tax so levied that it would divide the people of the United States into two classes."

The construction placed upon the proposed Sixteenth Amendment by Governor Hughes received wide publicity throughout the country. This belief was held and strongly expressed by many lawyers and public officials. It was referred to and discussed in the messages of a number of governors in submitting the proposed amendment to the State legislatures. For example, the Governors of Florida, Missouri, North Dakota, and Oklahoma all agreed with the interpretation of Governor Hughes that the Sixteenth Amendment extended the taxing power, but nevertheless they urged its ratification. From these sources it seems clear that a large number of supporters of the Sixteenth Amendment believed that they were conferring upon the National government the power to subject the interest from State and municipal bonds and the salaries of State officers and employees to an income tax.

As a matter of fact, the Pollock case had recognized the fact that the phrase "income from whatever source derived" includes income from state and municipal bonds.

The Income Tax Act of 1894 imposed a tax upon the income of persons whether derived "from any kind of property, rents, interest dividends or salaries or from any profession, trade, employment or vocation . . . *or from any other source whatever.*"

Could the Supreme Court have held that the Income Tax Law of 1894 was unconstitutional in so far as it applied to interest on State and municipal securities unless it construed the clause "from any other source whatever" to include income from State and municipal securities? Can the Supreme Court hold today that the words "from whatever source derived" in the Sixteenth Amendment do not include income from State and municipal securities, unless the Supreme Court ignores the usual canons of constitutional interpretation by construing the words of the Constitution more narrowly than the words of a statute?

Similar language in the Corporation Excise Tax Act of 1909 had also been held by the Supreme Court in *Flint v. Stone Tracy Company* [(1910) 220 U. S. 107] broad enough to include income from State and municipal securities. The congressional resolution to submit the Sixteenth Amendment, when introduced, did not contain the phrase "from whatever source derived." Was the addition of this clause by Congress, in the light of the decision in the Pollock case construing this phrase, frivolous?

When Nicholas Murray Butler, who was active in securing the ratification of the Sixteenth Amendment, was asked last fall his opinion on its meaning, he replied:

"There could be no more direct and unqualified grant of power to Congress to tax income from whatever source than is contained in the language of the Sixteenth Amendment. To adopt now another amendment definitely specifying that the Congress might tax income from sources which have been held exempt because of court decisions subsequent to the Sixteenth Amendment would be to make us the laughing stock of the world. That would be equivalent to saying that the words 'from whatever source derived' do not mean what they appear to mean, but must be supplemented by a variety of specific designations of sources of income. Out of this situation would arise a new series of court decisions which would exempt the income from sources not specified in the second amendment. The situation would be ludicrous to the point of absurdity. . . . "

The Constitution concededly is silent on reciprocal immunity from taxation. But even "where the Constitution is not wholly mum," writes Thomas Reed Powell, "it often speaks with such a still, small voice only a bare majority of the court can hear its echo."

After Congress breaks the silence by legislating out of existence income tax privileges on future governmental securities and salaries, the Supreme Court will more than likely exercise that restraint which Mr. Justice Washington reflected in his celebrated opinion in *Ogden v. Saunders.* [(1827) 12 Wheat. (U. S.) 213, 270.] After remarking that the question in that case was a doubtful one, he said:

"But if I could rest my opinion in favour of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this Court, when that subject has called for its decision; and I know that it expresses the honest sentiments of each and every member of this bench."

THE LIMA CONFERENCE AND THE MONROE DOCTRINE

Pan-Americanism not to Be Confused with Monroe Doctrine—Historical Origins of the Latter—A Purely Unilateral Declaration of Policy—Venezuelan Boundary Case and Secretary Olney's Note—Later Developments—Latin-American Sensitiveness on the Point of Sovereignty—Secretary Root's Effort to Remove Suspicion of Our Intentions—Address of Secretary of State Hughes before American Bar Association in 1923 Marked Return to Historic Fundamentals of Doctrine—Results of Eight Pan-American Conferences Have not Been Negligible—The Declaration of Lima, etc.*

By Hon. Bainbridge Colby
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PAN-AMERICANISM is not to be confused with the Monroe Doctrine. Although separate subjects, they impinge upon each other, however, and it is difficult to discuss either without reference to the other. The origin and history of the Monroe Doctrine is, of course, familiar to you all. There is no occasion for me to rehearse at length the circumstances that gave it birth.

The doctrine as proclaimed in 1823 contained three distinct features. The first was that the American continents were not open to further colonization by European powers; the second, that any attempt to extend the European political system to this hemisphere would endanger our peace and safety; and the third, that it was our policy not to interfere in the internal concerns of European powers but to cultivate friendship with them.

Taken as a whole, the doctrine clearly implied that the Western Hemisphere was separate and apart from the old world, and that the European powers in the future would be restricted to the colonies then in their possession. The idea that the United States should keep clear of European politics developed first, and I may inject at this point, that our demand that Europe should keep out of the Western Hemisphere was predicated upon our renunciation of intention to establish any footing in Europe.

The policy of isolation is almost as old as the nation. In 1781 Thomas Pownall, one of the Colonial governors, reminded the American people that nature had given them physical isolation, and that it was to their interest to have no connections with Europe other than commercial. John Adams, before peace was concluded at the close of the Revolutionary War, declared that we should not meddle in European affairs and that the European powers should not allow it, if we wished to do so.

Washington's ideas on this subject are well known. After the adjournment of the Constitutional Convention, he wrote to Jefferson, who was then in Paris, expressing the hope that the new government would be efficient enough to prevent the States from forming separate, improper, or, indeed any connection with European powers which could involve us in their political disputes—a point of view which he again and again adverted to, when President, and finally expressed in his Farewell Address in words which will live as long as the nation. "Why," said he, "by interweaving our destiny with any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalship, interest, humor or caprice"?

As far back as the Summer of 1818, President Monroe asked John Quincy Adams, his Secretary of State, to sound the British Minister on cooperation in recognizing the independence of the revolted Spanish colonies. With the dawn of the year 1823, however, the situation had changed. The Continental powers, under the lead of the Holy Alliance, were plotting to restore the Spanish King to his despotic power and to resubjugate the Spanish colonies. France was urged to play an active role in this undertaking, and it was this fact which stirred the suspicions of England and aroused her fears of undisclosed intentions. Our Minister to England was approached by the Prime Minister of the day, who sounded him on the possibility of joint action with England against the aspirations of the Continental powers. Our Minister seems to have felt, however, that England had nothing in view but ends of her own and was attempting to bend the United States to her service. Here again the feeling uppermost in the minds of our statesmen was the desire not to entangle ourselves in European politics on the side of any power.

Without expanding unduly this reference to the background of the Doctrine, it suffices to say that the Cabinet of President Monroe, confused by England's course, and suspecting that it was guided by purely English aims with which the United States was not concerned, determined that a warning could not further be delayed to the Holy Alliance against intervention in South America, and on December 2, 1823, rather suddenly, considering the protracted discussions which had been going on, President Monroe sent to Congress his famous message.

It is from this message that the Monroe Doctrine is extracted. Its principal points are:

1. The American continents, being free and independent, are no longer open to colonization by European powers.

2. We have not interfered, and shall not interfere, with existing colonies of European powers.

*Address delivered at the Biennial Meeting of the Maine State Bar Association at Augusta on Jan. 11, 1939.

3. Our policy has been, and remains, not to take part in the wars and internal politics of Europe; to recognize the de facto governments as legitimate; and to preserve friendly relations with all, when possible with honor.

4. We shall consider any attempt of the European powers to extend their political system, which is so different from ours, and is not acceptable to the people south of us, to any part of the hemisphere, or any attempt to oppress or control in any other manner the free states of the two Americas, as dangerous to our peace and safety.

5. The true policy of the United States is to leave the new states, which Spain can never subdue, to themselves.

6. We hope that other powers will also leave them to themselves.

It may be of interest at this point, in view of the rising conflict in the world today between opposing ideologies, to recall two of the professed purposes of the powers in the Holy Alliance, as stated by them in treaty form, namely:

"Article I. The high contracting powers being convinced that the system of representative government is equally as incompatible with the monarchical principles, as the maxim of the sovereignty of the people with divine right, engage mutually, in the most solemn manner, to use all their efforts to put an end to the system of representative governments, in whatever country it may exist in Europe, and to prevent its being introduced in those countries where it is not yet known.

"Article II. As it cannot be doubted that the liberty of the press is the most powerful means used by the pretended supporters of the rights of nations, to the detriment of those of Princes, the high contracting parties promise reciprocally to adopt all proper measures to suppress it, not only in their own States, but, also, in the rest of Europe."

The Doctrine enunciated by President Monroe, it should be noted, is clearly a unilateral declaration of the policy of the United States. It is not conditioned upon the assent of any other nation in the Western Hemisphere nor the cooperation of any other power in upholding it.

In the light of the continually renewed effort from time to time during the succeeding century to blur this fact, and to broaden the base of the Doctrine, in successive conferences between the powers of the Western Hemisphere, it would tend to a clearer understanding of the difficulties encountered in these conferences, to keep this basic fact clearly in mind, namely, that the Doctrine in origin was a declaration of American policy and nothing else, and such it continues to be to this day.

Undoubtedly the most downright assertion of this truth was contained in the note of Secretary of State Richard Olney, which was forwarded to Great Britain on July 20, 1895. It dealt with the then pending controversy between Great Britain and Venezuela relating to the boundary of British Guiana, at that time unsettled and in dispute.

President Cleveland, in his annual message to Congress on December 3, 1894, said with reference to this controversy:

"The boundary of British Guiana still remains in dispute between Great Britain and Venezuela. Believing that its early settlement on some just basis, alike honorable to both parties, is in the line of our established policy to remove from this hemisphere all causes of difference with powers beyond the sea, I shall renew the efforts heretofore made to bring about a restoration of diplomatic relations between the disputants and to induce a reference to arbitration."

About two months later Congress passed a joint resolution recommending to both Great Britain and Venezuela that they refer their dispute to friendly arbitration, as President Cleveland had suggested.

Great Britain, however, refused to entertain the idea of arbitration except on condition that a portion of the territory in dispute should be left out of the arbitration. Mr. Cleveland received the impression that Great Britain was taking advantage of the weakness of Venezuela and his determination stiffened that the stronger should not coerce the weaker. The controversy was in this unsatisfactory position when Mr. Olney succeeded Mr. Gresham as Secretary of State, upon the latter's death.

Almost the first important matter to claim his study was the Venezuelan boundary situation and early in July, 1895, hardly more than a month after his assumption of the duties of Secretary of State, Mr. Olney sent President Cleveland a draft of a note to the British Government, to be transmitted by the American Ambassador in London.

The note strongly commended itself to President Cleveland, who wrote his Secretary of State from his summer home on Buzzards Bay as follows:

"I read your deliverance on Venezuelan affairs the day you left it with me. It's the best thing of the kind I have ever read and it leads to a conclusion that one cannot escape if he tries—that is, if there is anything of the Monroe Doctrine at all. You place it I think on better and more defensible ground than any of your predecessors —or mine."

The note rehearsed the history of the Venezuelan boundary controversy and set forth the language and scope of the Monroe Doctrine. The essential purpose of the Secretary of State was to show that the United States looked upon Great Britain's proposed arbitrary rectification of the disputed boundary as in effect an expansion of European territorial dominion on the American continent and consequently a violation of the Doctrine. Speaking of the possibility of European intervention in the affairs of the American Republics, Olney said:

"The mischiefs apprehended from such a source are none the less real because not immediately imminent in any specific case, and are none the less to be guarded against because the combination of circumstances that will bring them upon us cannot be predicted. The civilized States of Christendom deal with each other on substantially the same principles that regulate the conduct of individuals. The greater its enlightenment, the more surely every State perceives that its permanent interests require it to be governed by the immutable principles of right and justice. Each, nevertheless, is only too liable to succumb to the temptations offered by seeming special opportunities for its own aggrandizement, and each would rashly imperil its own safety were it not to remember that, for the regard and respect of other States, it must be largely dependent upon its own strength and power. Today the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition. Why? It is not because of the pure friendship or good will felt for it. It is not simply by reason of its high character as a civilized state, nor because wisdom and justice and equity are the invariable characteristics of the dealings of the United States. It is because, in addition to all other grounds, its infinite resources combined with its isolated position render it master of the situation and practically invulnerable as against any or all other powers."

There was no claim that the Monroe Doctrine was grounded in and sustained by international law, but merely that the fiat of the United States was law upon

this continent upon the subjects to which it confined its interposition.

"There is, then," Secretary Olney proceeded to assert, "a doctrine of American public law, well founded in principle and abundantly supported, which entitles and requires the United States to treat as an injury to itself the forceful assumption by an European power of political control over an American state."

Great Britain received this stringent communication with praiseworthy calm, and continued the correspondence. Lord Salisbury, who was then Secretary for Foreign Affairs, replied with a denial that the Monroe Doctrine had the sanction of international law, and insisted that the Venezuelan dispute did not involve a conflict with the Monroe Doctrine, if justly interpreted.

Cleveland, some years later, after the dispute had been settled by arbitration (and I may interject that Great Britain obtained from the arbitrators more than she had originally demanded), commented that if we had been obliged to accept Lord Salisbury's estimate of the Monroe Doctrine, "it would have been unpleasant for us to know that a doctrine, which we had supposed for seventy years to be of great value and importance to us and our national safety, was, after all, a mere plaything with which we might amuse ourselves; and that our efforts to enforce it were to be regarded by Great Britain and other European nations as meddlesome interferences in affairs in which we could have no legitimate concern."

While Secretary Olney's courage and decision were master factors in determining our course in this critical incident, he had the full and hearty support of Mr. Cleveland, who said later, in reviewing the controversy:

"The Monroe Doctrine may be abandoned; we may forfeit it by taking our lot with nations that expand by following un-American ways; we may outgrow it, as we seem to be outgrowing other things we once followed; or it may forever stand as a guarantee of protection and safety in our enjoyment of free institutions; but in no event will this American principle ever be better defined, better defended, or more bravely asserted than was done by Mr. Olney in this dispatch."

While the Olney note was received with many expressions of dissent, particularly in Europe where its uncompromising interpretation of the Monroe Doctrine was highly unpalatable, the fact remains that his definition of the Monroe Doctrine as a policy of the United States is historically precise.

This interpretation, however, has always proved a source of disquiet in the relations between the United States and the Republics to the south of us. It has offended their national sensibilities. It has seemed an encroachment upon their sovereignty. And thoughts of sovereignty play a very important part in international relationships.

I recall an interesting talk I had with the late Lord Reading on the subject of sovereignty, and it may not be amiss to recall the circumstances which led to it. It fell to me to be a member of the American mission to an inter-allied war conference held in Paris in November, 1917. One of the purposes of the conference was to improve co-ordination among the various allied war services, to prevent overlapping of function and waste of effort and resources.

As a member of the United States Shipping Board I was named on the International Committee appointed to deal with this subject, and at a session of the Committee one afternoon I had spoken with perhaps more finality and emphasis than was expedient. The chief dispensers of ship tonnage during the war were England and the United States, and the other nations, including the French, were constant and at times very importunate in their requests for seagoing vessels to meet their needs. My remarks had evidently produced some little tension in the Committee, and Lord Reading had noticed it. On our way back to the Hotel Crillon Lord Reading said to me: "You know, Colby, in all international discussions one must keep constantly in mind the subject of sovereignty." And continuing he said: "No matter how weak or small a nation may be in fact, nevertheless on the basis of its sovereignty, it is the equal of the greatest, or at least insists upon being treated as if it were, and I have found it expedient in all dealings with lesser nations to emphasize the even plane of sovereignty in almost every sentence I utter. One must begin with a concession of this equality of sovereignty, repeat it at every opportunity as you go along, and end on sovereignty."

I have often recalled this conversation, and in every approach to the peoples of Latin America and in our effort to understand their sensibilities and to pay due heed to them, we must keep before us constantly this ticklish, unsubstantial and yet all important matter of sovereignty.

The point has a very clear illustration in the text of the Declaration of Lima, issued at the close of the recent Conference of American nations.

The sensitiveness of the signatory powers on the question of their sovereignty is revealed by the frequent recurrence of the word in the brief statement of the results of the Conference. Thus in the second paragraph we find: "That the peoples of America have achieved spiritual unity through the similarity of their Republican institutions, etc., their adherence to the principle of international law and of *equal sovereignty of States.*"

A little further one reads: "That, respect for the personality, *sovereignty* and independence of each American State, etc."

A few lines further on, we read "That, faithful to the above mentioned principles and their *absolute sovereignty,* etc."

In the paragraph which follows, again the thought is thrust to the fore. We read that "To make effective their solidarity, co-ordinating their *respective sovereign wills.*"

And in the same paragraph there follows this language: "It is understood the Governments of the American Republics will act independently in their individual capacities, recognizing fully their *juridical equality as sovereign states.*"

On the whole the Monroe Doctrine as an inhibition to European colonization, has proved effective, with the exception of some minor inroads upon it, such as the seizure of the Falkland Islands by Great Britain in 1833 under a shadowy claim, and the transfer by Sweden of St. Bartholomew to France, to which we raised no objection. The Monroe Doctrine on this point has received the rather negative sanction of not being challenged.

We have had, however, a good deal of trouble under a corollary phase of the doctrine arising from our effort to hold certain of the Central and South American governments to the performance of their international duties in order not to provoke intervention by European powers.

For many decades after the achievement of their independence, the Latin American countries were unable to control their ports and coast-lines, and suf-

fered under an intermittent land warfare of a bitterly partisan and guerrilla type.

It was inevitable that foreigners should suffer in property and person, and turn to their home governments for aid in obtaining redress. Some of the South American governments borrowed money only to have their engagements repudiated by revolutionary successors. Innumerable claims, both American and European resulted, with the claimants in almost every instance appealing to their home governments for diplomatic or military support.

Spain, France and England at various times dispatched fleets or resorted to blockades and landing parties to force the recognition of outstanding claims. The United States, unwilling to accept the role of protector or even regulator, was made uncomfortable by such incidents and tried every expedient, even that of a sentimental appeal for tolerance and indulgence on the part of the stronger nations, but the problem persisted and also the embarrassment of this country.

It was not the desire of the United States, as was said by Secretary of State Sherman in the McKinley administration, "to protect its American neighbors from the responsibilities which attended the exercise of independent sovereignty." This declaration of our position was made in 1897. The incident which provoked it was the dispatch by the German Government of two war vessels to Haiti to secure an indemnity of $30,000 for the fine and imprisonment of a German subject because of his part in a quarrel involving twenty-five cents.

But this ended the hands-off policy of this country. After the war with Spain had resulted in the independence of Cuba, the United States took charge of the Island and governed it until the Cubans could form a government of their own. Nominally the Island was given its independence. But in reality it was, and continued to be, for many years a virtual dependency under the Platt Amendment, which required the Cubans to incorporate in their constitution certain stipulations and concessions, suggested by us, to safeguard our interests and authority.

Then came incidents in comparatively rapid sequence in Venezuela, Santa Domingo, Haiti and Nicarauga, all of which involved friction, and are interesting chapters in the development of our Pan-American relations, but which time does not permit me to describe. We drifted into the assertion of a virtual protectorate over certain neighboring nations, and the exercise of a sort of police power, of which President Theodore Roosevelt had given warning shortly after he succeeded to the Presidency on the death of McKinley:

"If a nation shows that it knows how to act with reasonable efficiency and decency," said he, "in social and political matters, if it keeps order and pays its obligations, it need fear no interference from the United States. Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western hemisphere, the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power."

This position was logical. It reflected the vague fear which has always beset this country that we could not without danger to the principle of the Monroe Doctrine, suffer the direct application of force by European countries for the enforcement of their claims, even if just, against the nations of South America. And yet, by a singular perversity of fate, the protective motive which prompted such a declaration as the one just read, has been turned to our disadvantage, and imputed to our own imperialistic designs. Indeed, it is not an exaggeration to say that in some quarters in Central and South America, the danger of our aggression is more feared than that of Europe.

It has been an unhappy situation and it remains such today. Every administration at Washington without regard to party, has sought to allay this distrust of our policy and suspicion of our motives. Several of the later Pan-American conferences have been held in Latin American capitals as well chosen theatres for the affirmation of our disinterested friendliness and non-imperialistic aims. The conferences themselves have been pronounced successful. The sentiments exchanged and the speeches delivered have been of the most friendly character. And yet, a certain dissympathy seems to brood over the gatherings, a certain reserve, a certain suggestion of hollowness in the mutual assurances of confidence and respect.

Secretary of State Root in his tour of South America in 1906 in one of his speeches, aiming at this suspicion and doubt of our intentions, declared that

"We wish for no victories but those of peace; for no territory except our own; for no sovereignty except sovereignty over ourselves. We deem the independence and equal rights of the smallest and weakest member of the family of nations entitled to as much respect as those of the greatest empire; and we deem the observance of that respect the chief guaranty of the weak against the oppression of the strong. We neither claim nor desire any rights or privileges or powers that we do not freely concede to every American republic. We wish to increase our prosperity, to expand our trade, to grow in wealth, in wisdom, and in spirit; but our conception of the true way to accomplish this is not to pull down others and profit by their ruin, but to help all friends to a common prosperity and a common growth, that we may all become greater and stronger together."

Mr. Root then appealed for the broadest Pan-American unity in the following words:

"Let us unite in creating and maintaining and making effective an all-American public opinion, whose power shall influence international conduct and prevent international wrong, and narrow the causes of war, and forever preserve our free lands from the burden of such armaments as are massed behind the frontiers of Europe, and bring us ever nearer to the perfection of ordered liberty."

You will observe that while Mr. Root did not mention the Monroe Doctrine, it is nevertheless the very essence of his words, and is present by implication in his thoughts, and in the thoughts of those, no doubt, to whom he was speaking.

However, that the Doctrine stands as a shadow over their sovereignty, is the sincere belief of the friendly nations of Latin America, and this feeling is a source of chill and retardation to the growth of that friendliness and intimacy of intercourse which is at heart desired by them not less, I believe, than by us.

Time and again the endeavor has been made by spokesmen for the United States, to soften the force of this feeling. I myself contributed what I could to this effort, in an address at Montevideo, Uruguay, in the course of an official visit to certain South American countries in 1920. A contemporaneous writer, referring to the speech, said quite truthfully, "No representative of the United States could choose a more difficult subject, or one fraught with greater danger."

"I cannot understand," said I, "how there can be any misconception, even the slightest, of the far-sighted, un-

selfish and fraternal policy of the Monroe Doctrine in the light of its century of useful service, not to this hemisphere alone, but to the whole world. For it must be remembered that no countries have so fully and so profitably participated in the fruitage of stable government, of unmolested national independence and law-abiding liberty in South America as have the nations of Europe, to whom the declarations contained in the Monroe Doctrine were primarily intended to apply.

"What was it originally, and what has it ever been, but a solemn declaration by the United States of its belief in the capacity for self-government of each of the peoples of the Western Hemisphere, and an equally solemn engagement to safeguard them to the extent of its power against interference from any quarter, while forging ahead through the trials and vicissitudes which lie in the pathway of every nascent state? . . .

"With brilliance and splendor, the republics of the Americas have one by one emerged from the earlier period of struggle and taken their true position as self-competent powers. Their evolution has been not only rapid, but sound and symmetrical. In every aspect of their rounded national life they challenge comparison with the most advanced and enlightened States of the world. And thus the old doctrine of the inviolability of republican institutions in the western continents speaks with an ever-swelling note throughout the world, as nation after nation has outgrown the need of its protection, and become, with full equality, a participant in its maintenance and assertion."

A return to the historical fundamentals of the Doctrine marked a notable speech by Chief Justice Hughes, when he was Secretary of State, delivered bebefore the American Bar Association in 1923.

Quoting President Wilson, who said the Monroe Doctrine "always has been and always will be maintained by the United States on her own authority," Mr. Hughes declared that the Doctrine is distinctively a policy of the United States, and the United States reserves the right to define, interpret and apply it. Then he proceeded to grasp the nettle firmly by insisting that "The policy of the Monroe Doctrine does not infringe upon the independence and sovereignty of other American States." "Misconception upon this point," he added, "is the only disturbing factor in our relations with South American States."

Turning to the rather abstract and hypothetical point, so dear to Latin American critics of the Monroe Doctrine, that a cession of territory to a European nation could not be made, without running counter to the Doctrine, he remarked that he was aware that interference with the right to cede territory was regarded in many quarters as an impairment of political independence, but he maintained that there was an answer which was sound in law and calculated to breed respect for the good faith of the United States. This answer was that the United States enjoyed no less than any other country the "recognized right to object to acts done by other powers which threaten its own safety. The United States has all the rights of sovereignty as well as any other power; we have lost none of our essential rights because we are strong, and other American States have gained none, either because of increasing strength or relative weakness."

He asserted that American sentiment still regarded the acquisition of additional control of American territory by non-American powers as a menace to the safety of the nation, and that in asserting and maintaining that view in the interest of peace and security there was no practical interference with the independence of the Southern republics. "We simply assert," he declared, "the right which corresponds with rights which they themselves enjoy, and hence even in theory this assertion does not infringe upon their sovereignty."

In a word, his view was that the United States was justified in opposing a transfer of American territory to a non-American state because it felt, and had reason to feel, that such action jeopardized its own safety. In reality this did not mean that political independence was not interfered with by opposition to a transfer, but rather that there might be a solid excuse for such interference which any state under similar circumstances might invoke.

I will not assume to appraise this line of reasoning, but to me it seems that Mr. Hughes has contributed only a further affirmation of the position taken by Secretary Olney and President Cleveland.

The venerable doctrine under the Hughes interpretation is just as truly an American declaration of American policy, as Olney said it was, arising in our own competence and dictated by our national safety.

Every effort to refine it has left its original scope unchanged and served only to confirm its fixed and unvariable meaning.

Eight Pan-American conferences have now been held reaching down the years since the days of Henry Clay as Secretary of State. The latest and perhaps the most fruitful was that at Lima, concluded a few days ago. They have proceeded upon the assumed identity of outlook and interest on the part of the twenty-one republics of the Western Hemisphere arising from geographical situation and similarity of political institutions and ideals. Their purpose has been to sustain and strengthen the principles of democratic self-government in the world by the cultivation of mutual friendship and co-operation, and the promotion of commercial and cultural intercourse between the Western nations.

Their results have not been all that was hoped for and yet they have not been inconsiderable.

There are fundamental differences between us and the peoples of Latin America, arising from differences of racial strain and historical tradition. These account for divergences of outlook and reaction, to the shifting problems of life. There are conflicts of economic position and interest between us. There are commercial rivalries tending at times to become acute, which have their effect upon our feelings and relations.

But the fact remains that there are great and fundamental interests which we have in common, and there is a broad foundation upon which to build a firm structure of enlightened accord and mutual advantage.

The results of the Lima conference are embodied in the so-called Declaration of Lima.

It is not very specific. It deals rather grandiloquently in generalizations, and generalizations are apt to prove empty.

There is reference to spiritual unity, the similarity of our institutions, the mutual will for peace, the sentiments of humanity and tolerance by which the Conference was animated, adherence to the principles of international law, and the high estimate it attached to liberty without religious or racial prejudice.

The solidarity of Inter-American relations is proclaimed as well as the determination to defend the principles recited in the Declaration against foreign intervention, or activities that may threaten them. Provision is made to facilitate consultation between the nations represented in the Conference and collaboration in the maintenance of the principles it adopted. That is about all.

But it is much. Someone has said it is not so important what point in the journey you have reached,

(*Continued on page* 220)

LINCOLN PARDONS CONSPIRATOR ON PLEA OF AN ENGLISH STATESMAN

A Little Known and Interesting Incident in Lincoln's Career—Young English Conspirator on Behalf of Southern Confederacy Pardoned in Response to Request of John Bright and as a "Public Mark of the Esteem Held by the United States for the High Character and Steady Friendship" of the English Statesman—Attempt to Equip and Sail a Privateering Ship from San Francisco Harbor—Failure of Plan and Trial—Justice Field's Charge to Jury, etc.

By F. Lauriston Bullard*

OF all President Lincoln's pardons none is less known and few are as interesting as the one he granted for the sake of that sturdy British champion of the Union cause, John Bright. The story will not be found in any biography of Lincoln nor in any monograph dealing with his numerous acts of clemency. No history of the Civil War records the case. There are official documents covering the matter in part. The pardon itself appears never to have been noticed or textually quoted until George Macaulay Trevelyan published his "Life of John Bright" more than 25 years ago, but there is no account of the case in that work. Only once has the text of the pardon been reproduced in this country, and then cited from the Bright biography without any word of explanation. Some of the correspondence relating to Mr. Bright's interest in the case is to be found in R. A. J. Walling's edition of the "Diaries of John Bright," published in 1931. Certain letters about the matter, to one described by Mr. Bright as "my friend in Washington," were printed nearly 30 years ago at the behest of James Ford Rhodes in the Proceedings of the Massachusetts Historical Society, but without any recital of the facts behind the letters. The most interesting of these letters is reproduced in facsimile for this article. An account of the conspiracy in which the young Englishman for whom Mr. Bright interceded had become involved is contained in a volume on Confederate privateers published in 1928 by William Morrison Robinson, Jr., but he merely aludes to the pardon, nor does he seem to have been acquainted with the autobiographical report issued years afterward in which the man he describes as "the originator of the adventure" sets out his own part in what was at best a mad enterprise. Details are available from San Francisco newspapers and from Federal court records.

To put the facts together in a connected manner, with the inclusion of many items not mentioned heretofore, is the purpose of this article.

In 1860 the population of California was made up of a cosmopolitan multitude derived from the older States and many foreign lands, nearly all of whom had been lured there by the stories of the new El Dorado. The foreigners were indifferent to, and the Americans were divided over, the problems of the nation. Lincoln carried the State by a plurality only of 657 in a total vote of 118,840, divided among four candidates. At the outbreak of the Civil War the southern sympathizers, while in a minority, were better organized than the Unionists, and it is said that at one time there were 18,000 men on the rolls of the Knights of the Golden Circle. Among the adventurers who sought to capitalize the situation for the Confederacy was one, Asbury Harpending, who went to California from Kentucky in 1857 while still a very young man. In 1863 the magniloquent oath he took as a member of a secret order was read in court, with an outline of a scheme for seizing the forts about San Francisco Bay, when with this key to the State in their possession they "could control the outflow of gold on which the Union cause depended . . . as a stream of water is shut off by turning a faucet." That plan having failed, this audacious dreamer became "one of a number of prominent men" who proposed to capture on the high seas the gold shipments from "the Bay" to Panama. But —he would not become a "pirate." He must have a regular commission in the Confederate navy.

According to his own narrative, Harpending did not, as one writer has said, ride across the Continent on horseback. He went by steamship to Acapulco, crossed Mexico to Mexico City and Vera Cruz, and boarded a blockade runner for Charleston, whence he easily reached Richmond, and, after a few days, obtained an interview with Jefferson Davis. The Secession President warned him of the risks of his plan, and consulted Judah P. Benjamin on the question whether the procedure could be classed under international law as piracy. Harpending says that brilliant member of the Confederate Cabinet "gave an opinion that it would be entirely within the scope of international law to equip and sail a vessel out of any port of the United States, provided no overt act against commerce were committed before a foreign port was reached, letters of marque exhibited there, and the open purpose of those in command declared." With a commission as captain in the navy of the South, and letters of marque in blank, the names to be filled in later, Harpending returned by blockade runner to Aspinwall and thence up the Pacific coast on a regular mail steamer, arriving at San Francisco in July, 1862.

But—only one of those who had subscribed the funds for the high seas venture stood by his bargain. Ridgley Greathouse, of Yreka, near the Oregon bor-

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der, agreed to furnish money for buying a ship and outfitting her with guns and equipment.

And then there appeared "an unexpected ally." This was Alfred Rubery, an Englishman still under age, whom Harpending mistakenly understood to be a nephew of John Bright. Brought together in consequence of a dueling fiasco, these two curiously assorted men became close friends. Rubery was "almost idiotic with delight" over the privateering enterprise. He had seen something of the South and liked the southern people. What appealed to him most strongly was probably the love of adventure. The John Bright letters show him to have been the son of a widow living in Birmingham, the city which Bright represented in the Commons. Bright assumed he must be "wonderfully stupid" to "have engaged in any conspiracy," and yet he was informed that Rubery was "sharp and clever and was educated at the London University." At the outset Rubery undertook to aid in financing the scheme, but his drafts on parties in London were not honored.

With the Greathouse capital in hand the little group proceeded to buy a boat, enlist a suitable number of men, and put on board the supplies and munitions a privateer would require. One William C. Law, who had lived in South Carolina and had a checkered record as a ship master, joined the schemers and spotted the vessel they ought to have. Through him there was brought in a Canadian, Lorenzo L. Libby, who had been 23 years a mariner. The quintette agreed that the profits of their cruising should be scaled, with Greathouse having the largest share, followed in order by Harpending, Law, Rubery and Libby. They bought the schooner *J. M. Chapman*, a fast vessel of 90 tons burden, just 130 days out from New York via Valparaiso. A somewhat curious waterfront public were informed that they were outfitting in aid of the Liberals in Mexico where Maximilian was about to undertake the perilous adventure in which eventually he lost his life.

All told about 20 persons were to be on board on the night of March 14, 1863. The 15 men whom Harpending had engaged as privateersmen were to be concealed amidst the cargo in the hold. Law did not appear until the schooner had left the wharf next morning; he had imbibed unwisely and too well the night before. It was just at dawn that Libby, in the absence of Law, cast off the lines, but before the vessel could get out into the stream with her mainsail hoisted, two boats put off from the United States sloop-of-war *Cyane* which had been lying at anchor in the Bay. Law himself reached the *Chapman* just in time to be arrested with the others found on board. All the parties, the plotters and their dupes, were jailed on Alcatraz Island.

Great was the excitement up and down the coast. The papers demanded better harbor defenses. Brigadier General George Wright, commanding the Department of the Pacific, issued a circular of warning against treasonable acts. He considered it "more than probable" that "one or more vessels of like character and object" had already "sailed to prey on our commerce on this coast." From Fort Vancouver in Washington Territory came word that the plot "did not fail to extend to Oregon." Did not Greathouse come from Yreka, and was not Yreka well adapted for operations both up and down the coast? A vessel should be assigned at once for the defense of the Columbia River. There were rumors of widespread insurrectionary activities in the counties just north of the Bay of San Francisco. Within a month a "Copperhead newspaper office" in Sacramento was destroyed by a mob, and there were requests for the arming of merchant ships in view of the depredations of the *Florida* and the *Alabama*.

The newspapers carried the story to England and on May 15 John Bright wrote the first of his letters in behalf of Rubery to his "friend in Washington." This, of course, was Charles Sumner, chairman of the Senate Committee on Foreign Relations. He supposed Rubery to be "only a foolish young man who has thoughtlessly and ignorantly brought himself into trouble." He has assured his family that "hanging is not much the custom" of the American government and that he is writing "an influential person who may be able to save Rubery from any severe punishment." He asks Sumner to procure the lad's liberation "on condition that he shall at once return to England." He feels that this could be done "without harm to anybody, "understanding of course" that "there is no *special* guilt in the young man's conduct."

Sumner promptly brought this letter to the attention of the Secretary of War who in turn telegraphed General Wright. The reply came back that "no facts have been elicited showing Rubery to be an object of executive clemency. The feeling here is strong against all such actions."

In June San Francisco learned that a schooner had been taken by a United States warship for "diving and delving for treasure at the wreck of the *Golden Gate* without official authority." By that time the public had heard that the *Chapman* conspirators had intended, as one phase of their enterprise, to do that same thing. The loss of that fine ship in July, 1862, ranks among the great ocean tragedies of that period. She sailed from the Bay with $1,400,000 of treasure on board, and six days out, off Manzanillo, she had burned with the loss of more than 200 lives. At the time the *Chapman* was ready for business salvaging operations had recovered almost half the gold the *Golden Gate* had carried. General Wright had many arguments therefore to offer to sustain his request for funds and by August he was able to announce the allocation of $100,000 for additional harbor defenses. Meantime John Bright has thanked Sumner for his "care in the case of the young Englishman." He hopes that Rubery "may be treated with some leniency, seeing how little severity has been shown to the many 'traitors' with whom your government has had to deal, and I can hardly suppose that any public interest can suffer from sending him off to England." At least one American family also had been writing Mr. Bright in behalf of Rubery.

In October the "pirates" were brought to trial in the Circuit Court of the Northern District of California, before Associate Justice Stephen J. Field of the Supreme Court and Judge Ogden Hoffman of the District Court. The official records and the newspaper reports supply an abundance of facts about what the whole coast watched as a sensational trial.

The defendants, however, were not charged with piracy. They were indicted under the Act of Congress of July 17, 1862, for "engaging in, and giving aid and comfort to" the Rebellion. That law, known as the Confiscation Act, had been debated for months in the Senate. Reported from the Judiciary Committee by Lyman Trumbull, it provided among many other things that all the property, real and personal,

within the United States, belonging to persons bearing arms against the government, or giving aid and comfort to those in rebellion, and which could not be reached by ordinary legal process, should be forfeited and confiscated to the United States, and that the slaves of all such persons should be free. The President was prepared to veto this bill as opposed to the constitutional provision that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." At that time also Lincoln was pondering the emancipation edict which within a month he discussed privately with two of his Cabinet members. On the day before adjournment Congress passed a joint resolution designed to satisfy the President's chief objections, whereupon he signed both the Act and the Resolution. As to confiscation he said in his characteristic pithy manner that "the severest justice may not always be the best policy."

The indictment alleged that the conspirators "in the execution of their treasonable purposes procured, fitted out, and armed a vessel to cruise in the service of the Rebellion against the citizens, property and vessels of the United States," and that their ship sailed on such a cruise. All the evidence in the trial was presented by the prosecution. The defense announced that their principal witness had gone to Mexico, and that without his corroboration their other evidence would be useless. The chief witnesses for the government were no others than Law and Libby, called "penitent pirates" by the press. They turned State's evidence and for them the District Attorney entered a *nolle prosequi*.

The testimony showed that the revenue officers of the Federal government had maintained day and night an unceasing watch over the *Chapman* while she lay at her wharf. Every person who went aboard was noted and every box was counted. Just what her new owners proposed to do with her was not known but the authorities did not intend to allow her to quit the harbor until a search should have revealed her character. A signal system had been established with the *Cyane*, and complete arrangements for her seizure. The night before she was to sail 20 men had gone on board besides Greathouse, Harpending, Rubery and Libby. There were four genuine sailors and a cook. Concealed behind the cargo boxes in the hold were 15 "fighting men" whose presence was to be unknown to the actual crew. A quantity of lumber had been loaded for building a lower deck, a prison room, berths, and making other alterations when she should become a privateer. A complete outfit of blue uniforms were found, similar to those worn aboard American war vessels. A small amount of real cargo had been shipped for Manzanillo.

The boxes variously labelled "machinery," "reapers," and "oil mill," listed in a false manifest, contained the munitions required for the predatory work the schooner was expected to do. There were two brass 12-pound boat howitzers, a case of muskets, 30 kegs of powder, six bags of bullets, 15 cases of loaded and hollow shells, a lot of loaded revolvers, and a profusion of belts, holsters, percussion caps, and bowie knives. In the baggage of Harpending and Rubery there were numerous documents, in the former's handwriting, of a highly compromising nature. One detailed the plans for the capture of the forts about the Bay. Another contained the story-book oath which the members of the secret organization were to take. A third was a highly rhetorical denunciation of "the death warrant" which had been "written, signed, and caused to be published" by "that tyrant, Abraham Lincoln" on January 1, 1863, meaning the Emancipation Proclamation, with "the fiendish intention" of destroying the South. In the hold there were picked up many scores of scraps of paper, torn into small bits, chewed, partly burned, in the hurry of the plotters to get rid of as much incriminating evidence as possible.

Rubery and one other had shipped ostensibly as passengers, and passenger receipts had been issued for them, but neither had paid any money. In Rubery's trunk, according to the testimony of the Port Collector, there was found "a Zouave suit of uniform," described by another witness as comprising a blue coat, baggy red trousers looped up at the knees, with leggings, a red shirt and a small cap. Strapped outside the trunk was a sword bayonet, and inside was an unjointed rifle of English make.

The *Chapman* was to sail for Guadalupe, an island some 300 miles off the California coast, where Harpending and the 15 fighting men, "miners" so-called, were to be landed. She then would head for Manzanillo to unload what freight she carried, departing at once for the island to fit out as a privateer. At Manzanillo again the men would be enrolled, the letter of marque would be filled out and due notice sent to the Confederate government at Richmond. Then at last she would begin the hunt for Panama-bound treasure ships not forgetting to raid the salvaging vessel at the wreck of the *Golden Gate*. When the coast became too dangerous for her the schooner would head for the China Sea and the Indian Ocean.

The defense argued that war existed between the Union and the Confederate States, and that the latter were entitled to belligerent rights and therefore to privateers as a legitimate mode of warfare. Moreover the *Chapman* had not actually begun any voyage, nor had the prisoners committed any crime over which the Court had jurisdiction. They had given no aid and comfort to the South. Nowhere in the record of the Court nor in the newspaper columns is there mention of any argument in behalf of Rubery based on his British citizenship. Something tantamount to the existing situation had been discussed in Parliament more than two years before. The Queen's Proclamation of Neutrality was issued on May 14, 1861, containing a warning to all British subjects not to enlist for land or sea service under either flag, nor to supply munitions to either belligerent, or fit out ships for privateering, or in any other manner aid either of the combatants. The Lord Chancellor stated that once this Proclamation had been made any British subject who might enter the service either of the North or South would be liable to punishment for violation of the law of his own country, and would have no right to claim any interference on the part of the government to shield him from any consequences that might follow. But both he and Lord Derby emphatically affirmed that the Northern States could not convert a privateer into a pirate, nor invoke the death penalty for her crew.

Some of these matters may have been in the mind of Mr. Justice Field when he charged the *Chapman* jury. He considered the case "of much interest" because it was the only case of treason tried in California and on account of the "great importance of the principles involved." He held that "even if full belligerent rights had been conceded to the Confederate States, such rights could not be invoked for the protection

Rochdale Janʸ. 22. 1864

Dear Mr. Sumner,

Your letter of the 15th Decʳ. gave me much pleasure. I am greatly obliged to you for the trouble you have taken in the affair of Rubery. His poor mother has written to me to express her gratitude for what has been done for her son. It is a curious fact that her daughter, who has been for some months sinking into a condition of insanity, aggravated of the knowledge of her brother's offence & dangerous position, has been apparently partially restored to reason & to health by the weight of the news of his pardon & of his probable early return home. I have heard that in the announcement of the pardon no reference was made to the part I have taken in the matter, - if that be so, I should like to have a copy of the document, if one can be easily obtained. I have looked thro' the Archives, but have not found it. May I ask you to convey to the President my warmest thanks for the leniency he has shown to Rubery, & for the consideration he has shown for my representations on his behalf. I have not heard the subject spoken of in any society in England since it has produced a kindly feeling towards the President & towards the Govt. of the United States.

JOHN BRIGHT

PART OF LETTER FROM JOHN BRIGHT TO CHARLES SUMNER CONVEYING THANKS TO PRES. LINCOLN FOR PARDON OF ALFRED RUBERY

Hon^ble Always my sincere Yours
Chas Sumner
Washington. U.S. John Bright

of persons entering within the limits of States which never have seceded and secretly setting up hostile expeditions against our government and its authority and laws." He discussed at length the origin and nature of treason and ruled that "the offense of levying war is complete if directed only to the overthrow of government in certain portions of the country and not throughout the country." And further: "War of gigantic proportions is now waged against the United States. All who aid in its prosecution, whether by open hostilities in the field, or by performing any part in the furtherance of the common object, however minute or however remote from the scene of action, are equally guilty." Judge Hoffman, concurring completely in the principal points in this ruling, included in his "additional observations" this reference which is supposed to have been intended for Harpending: "For the accused personally I feel a deep regret, and especially for one of them, who appears to have been animated rather by a zeal for the cause which he has unhappily espoused than by the more unworthy motive of enriching himself by the plunder of his fellow citizens."

The jury went out merely for form's sake, and returned in four minutes with a verdict of guilty. Harpending, Greathouse and Rubery were sentenced to the extreme penalty possible under the Confiscation Act, a fine of $10,000 each and a prison term of ten years. The papers observed at the time that "this sentence is final," not reversible by any other court and alterable only by the President of the United States. Law and Libby took the oath of allegiance and gave their recognizance in the amount of $3,000 each. The other prisoners were discharged. The *Chapman* was sold at auction for more than $7,700 gold, and her arms brought $3,900 in legal tender notes. No one of the three prisoners remained long in jail. Judge Hoffman early in 1864, "not without reluctance," but by a strict construction of the General Amnesty Act of December 8, 1863, liberated Greathouse, although adhering to his original opinion as to the legality of his conviction. Harpending in 1913 published this statement: "I alone was held because it had been shown that I had a commission in the Confederate navy. In almost exactly four months after my sentence I was brought before Judge Hoffman and ordered released under the same amnesty law. The fine was likewise remitted. I am not versed in legal technicalities, but it seemed to me that the learned jurist stretched the strict letter of the law a bit in my behalf. Be that as it may be, I always held the name of Hoffman in high esteem."

In England John Bright kept in touch with the progress of events. There could of course be no intervention while the case was in the courts. In November following the trial he wrote Sumner that he knew the prisoners from the *Chapman* had been tried and found guilty but he did not know what their sentence had been. "If you can hear anything of the youth, Rubery," he continued, "and if you can do anything for him, I shall be glad if you will not forget him. . . ." Within a few weeks he was writing the Senator again, this time a letter of thanks. "I am greatly obliged to you," said Mr. Bright, "for the trouble you have taken in the affair of Rubery. His poor mother has written to me to express her gratitude for what has been done for her son. It is a curious fact that her daughter who has been for some months sinking into a condition of insanity, aggravated by the knowledge of her brother's offense and dangerous position, has been apparently quite restored to reason and to health by the news of his pardon and of his probable early return home. I have heard that in the announcement of the pardon a reference was made to the part I have taken in the matter; if that be so I should like to have a copy of the document if one can be easily obtained I have looked through the *Tribune* but have not found it. May I ask you to convey to the President my warmest thanks for the leniency he has shown to Rubery, and for the consideration he has shown for my representations in his behalf? I have not heard the subject spoken of in any society in England where it has not produced a kindly feeling towards the President and towards the Government of the United States. . . ."

In several ways the high regard in which Abraham Lincoln held John Bright was indicated during his Presidency. Most striking of all aside from this pardon is the fact noted by Professor Goldwin Smith in an article published early in 1865 in which he told of an interview with the President. He wrote: "You pass into the President's room through an anteroom. . . . The room is a common office-room—the only ornament that struck the writer's eye being a large photograph of John Bright." A fact of which few Americans ever have heard was noted some years ago by a visitor in the home of a daughter of Mr. Bright. There on the wall of her dining room hung "a copy of a resolution in President Lincoln's handwriting suggested by him as a form that might be adopted at public meetings held in England." Below that "form" John Bright had written an extract from a letter from Senator Sumner to him.

The documents in the archives in Washington indicate how promptly the President acted once he had the facts in the Rubery case. On November 20, 1863, Mr. Bright was writing Senator Sumner once more in behalf of the young man. On January 22, 1864, he was sending the Senator his thanks for the Presidential pardon. Midway between these dates, on December 17, 1863, Attorney General Edward Bates, at the direction of the President, asked the Secretary of State "to issue a warrant for the pardon of Alfred Rubery," in a form carefully prescribed by the President and recited in detail by Mr. Bates. The pardon was issued on that same day. As was customary during the Civil War the original pardon was forwarded to the party himself. The regular procedure was that the data in criminal cases was assembled in the Department of Justice whence instructions for the issue of the pardon were sent to the Department of State in the form of departmental memoranda. Where that original document is today is not known. The files in Washington contain this copy:

ABRAHAM LINCOLN,

President of the United States of America, to all to whom these Presents shall come, Greeting:

Whereas, one Alfred Rubery was convicted on or about the twelfth dav of October, 1863, in the Circuit Court of the United States for the District of California, of engaging in, and giving aid and comfort to the existing rebellion against the government of this country, and sentenced to ten years imprisonment and to pay a fine of ten thousand dollars;

And whereas, the said Alfred Rubery is of the immature age of twenty years, and of highly respectable parentage;

And whereas, the said Alfred Rubery is a subject of

Great Britain, and his pardon is desired by John Bright of England;

Now, therefore, be it known, that I, Abraham Lincoln, President of the United States of America, these and divers other considerations me thereunto moving, and especially as a public mark of the esteem held by the United States of America for the high character and steady friendship of the said John Bright, do hereby grant a pardon to the said Alfred Rubery, the same to begin and take effect on the twentieth day of January, 1864, on condition that he leave the country within thirty days from and after that date.

In testimony whereof I have hereunto signed my name and caused the Seal of the United States to be affixed.

Done at the city of Washington, this seventeenth day of December, A. D. 1863, and of the Independence of the United States the eighty-eighth.

—Abraham Lincoln.

By the President,
William H. Seward,
Secretary of State.

It may be that President Lincoln would have pardoned that youth in any case with the same set of facts before him. But the plea of John Bright he could not deny. He seized the opportunity to make plain to the whole British people the grateful affection and respect with which the hard-pressed defenders of the Union regarded their friends abroad. The pardon reflects the qualities which made Lincoln a shrewd politician, a tolerant statesman, and a considerate and kindly gentleman.

There are a few facts and perhaps some legends available as to the subsequent life of Rubery. As a matter of course he quit California for England, but some years after the war he became involved with Harpending and others in the prospective exploitation of a great diamond field in Montana. Experts declared the find genuine and there was plenty of excitement about it in various cities. Then Clarence King, the geologist, made his way to the field, and returned to tell the world that it had been "salted." That was the end of the "great diamond hoax." Rubery perhaps had no guilty knowledge of the swindle. In May, 1864, however, as English writers recall, he sought to collect damages from a Birmingham newspaper for what he considered a libelous article on the *Chapman* case. Harpending deals with the story also of a suit against *The Times* of London for certain statements attributed to its financial editor amidst the diamond excitement, after which Rubery migrated to Australia, and Harpending heard no more of his companion adventurer.

Lima Conference and the Monroe Doctrine

(*Continued from page* 214)

as what direction you are going in, and these declarations all point at least in the right direction.

But there is nothing of concrete accomplishment as yet in the field of Pan-Americanism which absolves us from the duty of taking realistic views of our place in the world and of maintaining, with all our courage and resource, historic policies which have builded our strength in the past and may prove vital to our national survival in the future.

In the midst of a world poised for aggression, and disturbed as probably never before in the course of history, it behooves us to take an inventory of our strength as well as of our benevolent dispositions.

London Letter

Middle Temple Scholarships.

THE Benchers of the Middle Temple have recently announced their intention to award annually, in March or April, three Scholarships, to be known as "Blackstone Entrance Scholarships," by which the holders of such scholarships will be entitled to be relieved of the fees and deposits payable to the Inn up to and including Call to the Bar, and to an indemnity against all stamp duties payable on admission and Call. At the present time the fees and deposits on admission to the Inn amount to £208:14:3; and fees on Call to the Bar are £112. There is an annual duty of £1 and a fee of 10/- for every term in which a student dines. Candidates for these Scholarships must be British Subjects intending to practice at the Bar in England or Wales, and must be under the age of twenty-five on the 1st January in the year in which application is made for a scholarship. There will be no examination for these scholarships. They will be awarded to those candidates who appear to the Scholarships and Prizes Committee of the Inn to be most deserving and promising, special regard being had to the means of the candidate. Every scholar must, unless he has already done so, immediately join the Middle Temple and regularly keep terms there until he has completed the full number of twelve required for Call to the Bar. He will be obliged to pass part 1 of the examination for Call—which includes (i) Roman Law, (ii) Constitutional Law (English and Colonial) and Legal History, (iii) Contract and Tort, and (iv) Real Property, or Hindu and Mohamedan Law or Roman Dutch Law—within eighteen months of his election unless he has obtained exemption therefrom, and part 2—which comprises (i) Criminal Law and Procedure, (ii) Common Law, (iii) Equity, (iv) Company law and either practical conveyancing or a special subject in Hindu Law, or a special subject in Mohamedan law or a special subject in Roman Dutch law, (v) Evidence and civil procedure, and (vi) a General paper in two parts on Common law and Equity, before the end of the twelfth term. After this the scholar must be called to the Bar at the Middle Temple as soon as practicable. If he fails to comply with any of the conditions or fails to pass at any examination he will no longer be entitled to any of the benefits of the scholarship, unless owing to special circumstances, the Committee in their discretion otherwise determine.

In addition to the Blackstone Entrance Scholarship the Middle Temple will also award three Blackstone Pupillage Prizes in July of each year. The prizes, of 100 guineas each, will be used for the purpose of paying the fee or fees for Reading in the Chambers of a practicing Barrister or practicing Barristers, to be approved by the Scholarships and Prizes Committee, for one period of twelve months or two periods of six months each. No member of the Inn will be eligible for these prizes unless he is a British subject, has passed his examinations, and intends to practice at the Bar in England or Wales. As in the case of the Entrance scholarships there will be no examination, but special regard will be had to the means of the candidate, and the amount of the prize will not be paid to him direct, but to the Barrister or Barristers in whose chambers the candidate intends to become a pupil.

White Gloves

The custom of presenting white gloves to the

Judge when there are no criminal cases for hearing was observed recently at the Mansion House when Sir Harry Twyford, the Lord Mayor, who sits as a Judge there, found a blank charge sheet before him. In expressing his pleasure he said "I have been waiting for these gloves for forty-nine years. I am glad they have arrived at last. Frankly it is not the gloves I am so pleased with as the fact that for once I have no work to do."

The custom of presenting gloves in the English Courts of Justice can be traced back to remote periods in their history. In those early days we find that it was the prisoner who made the presentation. When a man was convicted of murder or manslaughter and, afterwards, made petition on his knees for the King's pardon, the Judges and Court officers were presented with the gloves by the pardoned criminal, such presentation being accepted as lawful "fees of Court." The earliest mention of the custom is to be found in the Year Books of 34 Henry VI. 38 (1456) in the case of Humfrey Bohm. In the 1824 edition of Hawkins Pleas of the Crown (vol. 2, p. 552), is a note which establishes the fact that the presentation was obligatory. It reads: "That the judges may insist on the usual fee of gloves to themselves and officers, before they allow a pardon." The last case of this nature to be reported was decided in the 28th year of CharlesII. One "B.G. having been indicted for the murder of Robert Clerk surrendered himself in Michaelmas Term, 28 Car. 2. and being brought to the King's Bench Bar the same term, and arraigned, pleaded the King's Pardon, which was read, he being on his knees. Then Twisden, Justice, observed that the pardon did not recite the Indictment, and that he remembered it had been question'd, whether a pardon after indictment, without mentioning it, should be allowed. But he thought the pardon in this case was well enough, for it had these words, *sive* (the prisoner) *suit indictat sive non*. Note this pardon was *per verba* of (*felonicam interfectionem quamcunq*); with a *Non obstante* the statute of R 2 &c and was allowed by all the Court, and the Prisoner, after grave Advice given him by the Lord Chief Justice and Twisden, discharged, and afterwards according to the custom he presented gloves to all the Judges." The custom of presenting gloves to the Judges by a pardoned criminal has long since died out, but it is still the practice for the Sheriff to present white gloves to the Judge on a maiden assize, that is when there are no cases for trial.

Criminal Law Reform

The Criminal Justice Bill, recently introduced in the House of Commons by the Home Secretary, Sir Samuel Hoare, has given rise to considerable discussion. Those who believe that the criminal is already treated with too much leniency seem to think that, if the Bill becomes law, he will be better off than many who, in spite of difficulties, remain honest. An explanatory memorandum to the Bill states that its object is to improve the methods of dealing with persons found guilty of offenses, including adolescent offenders and persons who commit repeated offences. Many of the proposals are based on the recommendations of Departmental Committees. The Bill amends and consolidates the law relating to the probation system, and incorporates a number of minor changes in procedure. One of its main objects is to provide for the abolition of imprisonment as a method of treatment for young offenders convicted of such offences as are dealt with by courts of summary jurisdiction, and to substitute alternative methods. It is proposed to authorise the provision of special institutions to be called "Remand Centres", to which young offenders remanded or committed for trial in custody are to be sent instead of to prison. Such remand centres will serve not only the purpose of custody, but also the purpose of observation from a medical or any other point of view as may be desirable in order to assist the Court in deciding how best to deal with the offender. These remand centres are to be available for persons between seventeen and twenty-three years of age, and for those between fourteen and seventeen who are certified by the Court to be of so unruly or depraved a character that they cannot be detained in a remand home. At present boys and girls so certified are liable to be sent to prison on remand. There will also be State remand homes in addition to the remand homes now provided by local authorities for persons under seventeen, and compulsory attendance centres where it is proposed to try out the experiment of requiring young offenders to attend at times when they would otherwise be at leisure during a half-day's holiday or in the evening after work. At present young people are sentenced for minor offences to short terms of imprisonment of from one to four weeks.

It is proposed to abolish the existing powers of the Courts to pass sentences of corporal punishment, but corporal punishment for serious prison offences is to be retained. With reference to the proposed abolition of this form of punishment it is interesting to note that during the current term two High Court Judges have passed sentences of flogging, and have expressed themselves in no uncertain terms as to the need for this corrective treatment for persons guilty of crimes of violence. Under present conditions the treatment in prisons of persons sentenced to penal servitude does not materially differ from the treatment of those sentenced to imprisonment and it is therefore proposed to abolish penal servitude. This also involves the abolition of the 'ticket-of-leave' system by which persons on license from penal servitude are required to keep the police informed of their place of residence. In place of this the offender who has been repeatedly convicted of serious crime will be required to keep in touch with a society to be approved by the Secretary of State. Only if he fails to do this will he become liable to report to the police. It is also proposed to abolish 'hard labour', which was first introduced in English prisons in the year 1706, and took the form of the crank and treadmill.

The Bill further proposes to substitute sentences of corrective training and preventive detention for sentences of imprisonment or penal servitude, on persons between twenty-one and thirty years of age whose records, characters and habits are such as to make such a sentence expedient for the training of the offender; and on persons over the age of thirty if, by reason of the offender's criminal antecedents and mode of life, such sentence is expedient for the protection of the public.

One must, of course, admit that Departmental Committees and psychologists are better qualified to know what is the proper treatment for offenders against the law, than is the ordinary "man in the street". It would seem, however, that the said offenders might well be justified in repeating, with some happy warmth of feeling, the words of the famous song "There's a good time coming be it ever so far away".

The Temple. S.

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JOVRNAL

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MR. JUSTICE BRANDEIS RETIRES

The hearty good wishes of American lawyers, as well as of a large part of the citizenry he served so long and ably, go with Mr. Justice Brandeis in his retirement from active work in the great Court. There is a general wish that he will live long to enjoy leisure, renew the companionship of friends, and continue his wise counsel to contemporary efforts to ameliorate injustice and inhumanity throughout the world. A great intellect and a judicial statesman of first rank has left the Court in the full vigor of his powers, and his release from the exacting requirements of unremitting toil in the Court may leave him freer to combat in new ways the consequences of arbitrary power in that "subtler civilization" in which "from oppression by force we have come to oppression by other ways."

As usual, the most trustworthy appraisal of the work and worth of the retiring Associate Justice has come from his colleagues in the work of the Court:

"Dear Justice Brandeis:

"We deeply regret that you have found it advisable to retire from your regular active service as Associate Justice, a service which you have rendered for over twenty-two years with a vigor and devotion which have never been surpassed. Your long practical experience and intimate knowledge of affairs, the wide range of your researches and your grasp of the most difficult problems, together with your power of analysis and your thoroughness in exposition, have made your judicial career one of extraordinary distinction and far-reaching influence.

"It has always been gratifying to observe that the intensity of your labors has never been permitted to disturb your serenity of spirit and we shall have an abiding memory of your never-failing friendliness. We trust that, relieved of the burden of regular Court work, you may be able to conserve the strength which has been so lavishly used in the public service, and that you may enjoy many years of continued vigor. We extend to you our best wishes and the assurance of our affection and profound esteem.

Faithfully yours,

CHARLES E. HUGHES
PIERCE BUTLER
HARLAN F. STONE
OWEN J. ROBERTS
HUGO L. BLACK
STANLEY REED
FELIX FRANKFURTER."

The characteristic reply by Mr. Justice Brandeis follows:

"2205 California Street,
"Washington, Feb. 18, 1939

"My Dear Chief Justice:

"You and the associate justices are very generous. Our friendship gives assurance that throughout the years to come we shall remain companions.

Cordially,

LOUIS D. BRANDEIS."

The judicial career of Mr. Justice Brandeis is a striking illustration of the sound working of the American judicial system, so long as the essentials of an independent and untrammelled judiciary are maintained. At the time of his appointment, his elevation to the bench was strongly and sincerely opposed by many leaders of the Bar, who had felt the impact of his crusading lance and feared that his qualities of mind would not lend themselves to judicial work. He was named to the bench at an age and maturity which would now be deemed by some to be disqualifying—he was sixty years of age in November following his ascension to the bench in June of 1916—yet in his eighty-third year he retires after more than twenty-two years of active service, during which he influenced the jurisprudence of his country as few men have done, and won lasting respect as a tireless champion of individual liberty, a keen analyst of trends in business and government, an ever-young defender of the eternal right of free men to experiment in the solution of vexing problems of human

welfare within the framework of the Constitution as he viewed it. Many men disagree profoundly with some of his interpretations, but none can question his staunch adherence to the Bill of Rights as sword and shield of priceless liberties, his distrust of arbitrary power in private or public hands, and his unceasing purpose that judicial decision shall promote rather than obstruct the ability of government by the people to struggle with its unending problems through the processes of "trial and error."

Nearly ten years ago, Felix Frankfurter and Nathan Greene dedicated to Mr. Justice Brandeis their book on labor law, and they said that, to him, "law is not a system of artificial reason but the application of ethical ideals, with freedom at the core." Undoubtedly it was in the realm of economic statesmanship that the retiring Associate Justice made his outstanding contributions to the work of the Court. His insistence that the individual States shall be unhampered as laboratory units of social experimentation in good faith, his fears that mere size in business or governmental machinery may take away individual opportunity and freedom and engender an irresponsibility which takes no account of "ethical ideals," and his opposition to delegations of uncharted and unbridled power in the National sphere, now seem conservative and admonitory to many persons who at first challenged his concepts.

In any event, in an era in which free government according to law seems often "on the scaffold" and the rise of arbitrary personal power in governments threatens liberty throughout the world, American law and lawyers will not soon forget the profound influence of the rugged jurist who developed and expounded a philosophy of the law as "the application of ethical ideals, with freedom at the core."

LEGISLATIVE DRAFTSMANSHIP

There has been recently discovered the following paragraph written by that great authority Sir Frederick Pollock. It was originally used in a book review and has not heretofore been included in any of his published works. It reads as follows:

"Every written law which goes beyond mere regulation of details is a work of art; it can no more afford to dispense with unity of design and continuity of execution than a monumental building. It should proceed from one mind, or from very few minds working in intimate association, and it should be framed, if not by one hand, at least under uniform general direction and by hands trained in one school. Where these conditions cannot be satisfied in the first instance, the next best thing is to secure a certain measure of uniformity by careful authoritative revision in the final stage."

Recent events have demonstrated the wisdom of this text.

It has many times been demonstrated that good legislative draftsmanship is impossible by a body in which a considerable number of persons participate in the debate.

President Hogan in a recent discussion of this matter, referring to the amendment of the proposed bill of the Administrative Law Committee by the House of Delegates, said in a recent communication to members of the Board of Governors:

"While I am sure every one of us who was present found the discussion of questions relating to needed administrative law legislation interesting, I submit that it is not practicable for a body as large as the House to sit as a committee and give consideration to the details, so far as form is concerned, of proposed legislation. During the debate, as you will recall, suggestions were made for editing in matters of phraseology and even in punctuation. It is my own present view that if there is submitted to us the proposed legislation in substance, rather than drafted bills in detail, there will be before the House all that is necessary for adequate consideration, provided that the recommendations are as specific and definite as they were, for instance, in the case of those which you considered as part of the report of the Committee on Labor, Employment and Social Security. I take the liberty of throwing out the foregoing merely as a suggestion for your consideration."

At the same meeting of the House of Delegates final and definite action was taken on the method of passing upon the precise form of legislation when the definite approval of the Association was necessary both in substance and in form. The matter came up in the consideration of proposed legislation offered by the Conference of Commissioners of Uniform State Laws which, by action of the House of Delegates a year ago, was required to be presented in advance and approved by the House before presentation to the several State Legislatures. The method worked out as a necessary prerequisite for the approval by the American Bar Association involved, first, approval by a committee on form and style of the Conference itself, then the automatic reference of the proposed legislation to the Board of Governors and its standing committee on form and style, and recommendation by the Board of Governors to the House of Delegates.

While it is believed that this mechanism reasonably takes care of the necessities of the case so far as the American Bar Association is concerned, the subject has a wider importance. Eccentricities and crudities of State statutes have been a fruitful field for ridicule for many generations. Defective legislative draftsmanship can only be avoided in those States where a competent legislative drafting

bureau has been formed and equipped for work.

One source of this difficulty arises from the fact that lawyers who have had but little experience in this particular branch of professional work venture to perform it extemporaneously without the necessary study of what has been written and printed and spoken on the art of draftsmanship. They may be skilled in the language of pleadings, conveyances, and contracts but inexperienced in the very different language requisite for the expression of the legislative will.

The desirability of uniformity of style in statutes does not rest alone upon esthetic or artistic considerations. The task of statutory interpretation would be greatly lightened by a more careful choice of forms of expression.

The action of the Conference of Commissioners on Uniform State Laws many years ago in establishing and promulgating for their own guidance rules for legislative draftsmanship, is an example which merits general approval.

THE PROPOSALS OF BAR ASSOCIATIONS GO FORWARD OR FAIL ON THEIR MERITS

"THE significance of an institution such as the American Bar Association should be understood and the ways in which its ideas may be carried forward should be appraised. True, its recommendations are disinterested, experienced and often expert, and representative of a considerable cross-section of diversified opinion. But according to latter-day standards of political effectiveness, can anyone imagine an organization less able and less suited to force acceptance of its proposals? This organization cracks no party whip, controls no newspapers, commandeers no radio stations, hires no press agents, wields no power of taxation or assessment, scatters no funds, distributes no patronage, rallies no regimented dependents, maintains no lobby anywhere in the Nation. No county agents do its bidding; no precinct captains canvass for its proposals; no radio blares them into the homes of the land. Small wonder it is that cynical 'experts' in the tactics of 'government by pressure' are contemptuous of such an organization. Why, in political affairs, it could not control or 'close-herd' the votes of its own members. Even when a majority of its members have decided its policy by mail-ballot referendum, the Association clamps no 'unit-rule' on the views of its dissentient minority. Its proposals still have to stand or fall on whatever merits they are found to have, in the great court of public opinion.

"Here, then, is a characteristic American institution which, in a time of blatant propaganda and insistent pressures from coalesced minorities, dares still to submit its ideas to public scrutiny and to acceptance or rejection on their reasonableness and merits. Aside from a clerical staff in its headquarters city, the Association depends on the time and the thought, the energy and the ideals, unselfishly volunteered in its support by men who freely give it their leisure. And on countless battlefronts during the past sixty years, the American Bar Association has been effective in many good causes, has helped to advance proposals which now are bulwarks of free institutions. We are told often that the fundamental rights and welfare of men depend on one man or on one party or faction of men, yet the American Bar Association dares to believe and urge that those rights are safeguarded by the Constitution, and can be saved as long as free Courts are manned by courageous lawyers. At a time when the influence of 'pressure groups' in behalf of particular interests seems often too strong to be resisted, we are faced with the fact that the effectual resistance can come from associations of volunteers who advocate disinterestedly such proposals as will serve the common welfare. The recommendations of lawyers carry weight and find acceptance only as they stem from the common interest, the public welfare. Bar Associations are impotent unless they champion the common rights and give articulate voice to the long-run public interest, the ultimate consensus of reasoned opinion among patriotic men and women."—WILLIAM L. RANSOM, in an address before the Philadelphia Bar Association on December 6, 1938.

COUNCIL OF SECTION OF COMMERCIAL LAW MEETS

A MEETING of the Council of the Section of Commercial Law was held in Chicago on January 8th, at which the progress of the Section now in process of organization was discussed.

The Membership Committee reported a paid enrollment in the Section of approximately 700 members, with new enrollments arriving at the executive offices daily.

It was decided that the program of the Section at the San Francisco meeting should be devoted, in large part, to an Institute upon the subject of the Chandler Law. At the Institute, the Chandler Law and procedure under it will be discussed in two sections: (1) Corporate reorganizations, including the place of the Securities Exchange Commission, a governmental administrative agency, in these judicial proceedings; (2) Bankruptcy liquidations under the Chandler Law, including the changes in substantive law and procedure brought about by the amendments of the Bankruptcy Act under the new law, and also some comparative features of liquidation in bankruptcy as contrasted with liquidations by agencies and other intermediaries outside of bankruptcy. The Institute is to be held on Tuesday, July 11, immediately following a brief business meeting of the Section and will proceed throughout the day. The tentative plan also includes a noon luncheon given by the Section for its members, guests and visitors at which a short program is to be arranged.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

The next Annual Meeting of the Conference will be held at the St. Francis Hotel, San Francisco, California, beginning Monday, July 3, 1939.

Applications for hotel reservations should be made to the Reservation Department, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

(For details as to information required by Reservation Department with respect to reserving hotel accommodations, please refer to the general announcement to all members of the Association also appearing in this issue of the JOURNAL on p. 259.)

REVIEW OF RECENT SUPREME COURT DECISIONS

Public Utility Companies Doing Business in the States Wherein the Tennessee Valley Authority Is Selling or Is about to Sell Electric Power Generated at Dams Erected by the Authority under the Act of Congress Held without Standing to Challenge Constitutional Validity of Measure—Agreements by Distributors of Motion Picture Films Imposing Restrictions on Second-Run Exhibitors Held to Violate Sherman Antitrust Act—Franchise Provision That Public Utility Must Lower Rates under Certain Conditions not Delegation of City's Regulatory Power—New Hampshire Act Regulating Use of Motor Vehicles Sustained—Federal Tobacco Inspection Act of 1935 Upheld—California Uses Tax Valid—Other Cases

By Edgar Bronson Tolman*

Tennessee Valley Authority Act—Validity Thereof —Standing of Utility Companies to Challenge Constitutionality

Public utility companies, engaged in the business of generating and distributing electric power under non-exclusive franchises in the states wherein the Tennessee Valley Authority is selling or about to sell electric power generated at dams erected by the Authority under the Tennessee Valley Authority Act, have no standing to challenge the constitutional validity of that Act. Such injury as they may suffer from the competition of the Authority is damnum absque injuria and forms no basis for a suit to enjoin the Authority and its officers on the ground that the latter are, under powers purported to be conferred by the Act, acting in violation of the Fifth, Ninth and Tenth Amendments, to the injury to the utility companies.

Tennessee Electric Power Co. v. Tennessee Valley Authority, 83 Adv. Op. 341; 59 Sup. Ct. Rep. 366.

This case involves questions as to the validity of certain acts of the Tennessee Valley Authority and its three executive officers and directors. That Authority was created under an Act of Congress as an instrumentality of the United States to develop, by a series of dams on the Tennessee River and its tributaries, a system of navigation and flood control, and to sell power created by the dams. One utility company which transmits electricity in Tennessee and Alabama, and eighteen utility companies which generate and distribute electricity in Tennessee, Kentucky, Mississippi, Alabama, Georgia, West Virginia, Virginia, North Carolina and South Carolina brought suit in a county court of Tennessee to restrain the Authority and its directors from generating electrical power out of the water power created as a result of the Authority's plan of construction and operation of the dams and from transmitting, distributing or selling the electricity so generated in competition with the complaining utility companies; from constructing, or financing the construction of steam or hydro-electric stations, transmission lines, or means of distribution which will duplicate or compete with the utility companies' services; from regulating the utility companies' retail rates through any contract, scheme or device, and from substituting federal regulation for state regulation of local rates, more especially by incorporating in contracts for the sale of electrical power provisions which fix retail rates.

The defendants removed the case to a federal court in Tennessee where a hearing was held before three judges. After hearing, that Court dismissed the bill of complaint.

Thereafter fourteen of the complainants appealed to the Supreme Court where the decree of dismissal was affirmed in an opinion by Mr. Justice Roberts.

He summarizes the contentions of the appellants as follows: That water power cannot constitutionally be created under the Act; that the United States will therefore acquire no title to it since it will not be produced in the exercise of federal power to improve navigation or control floods in the nation's navigable waters. That the statutory plan is a plain attempt, under guise of exercising granted powers, to exercise a power not granted to the United States, namely, the generation and sale of electric energy. That the execution of the plan contravenes amendments Fifth, Ninth and Tenth of the Constitution in that the sale of electricity on the scale proposed will deprive the appellants of their property without due process of law, will bring about federal regulation of the internal affairs of the States and deprive their people of their guaranteed liberty to earn a living and to acquire and use property subject only to state regulation. These contentions, however, the majority of the Court found it unnecessary to pass upon, for the reason that the appellants have no standing to maintain the suit.

In developing the reasons for this conclusion, Mr. Justice Roberts first summarizes the acts of the Tennessee Valley Authority which the utility companies claimed gave rise to their cause of action, namely, (1) the sale of electrical energy at wholesale to municipalities empowered by law to maintain and operate their own distribution systems; (2) the sale of such energy at wholesale to membership corporations organized under state law to purchase and distribute electricity to members without profit; and (3) the sale of firm and secondary power at wholesale to industrial plants. It appeared that the appellants operate under franchises or licenses granted by the States in which they operate, or by municipalities or governmental subdivisions of the States, but it was admitted that *none* of the utilities held franchises granting to them any *exclusive* privilege. It was admitted by the Authority, on the other hand, that under its program as already carried into effect or as contemplated the Authority's activity will

*Assisted by James L. Homire and Leland L. Tolman.

result in direct competition with appellants' enterprises through the sale of electrical power to industries in areas now served by them or in areas susceptible to service by them. The Authority admitted also that such activity on its part will result in damage to the appellants, but contended that such damage was not the basis for a cause of action, because *damnum absque injuria.*

The appellants relied upon the doctrine that one threatened with a direct and special injury by the act of a governmental agent which, but for statutory authority for its performance, would be a violation of legal right, may challenge the validity of the statute in a suit against the agent. In this connection they urged that the Authority by its competition with them destroys their property and rights without warrant, since the Authority's authorization of its transactions is an unconstitutional statute. They classify their franchises as follows: (1) those involved in the state's grant of incorporation or domestication, and (2) those arising from the grant of the privilege to use and occupy public property and public places for the service of the public, and urged that both classes of franchises are being destroyed by the Authority's competition. They argued further that since the Authority attempts to justify its acts by the terms of the Tennessee Valley Authority Act, the appellants have standing to challenge the constitutionality of that Act. Denying the soundness of these contentions, MR. JUSTICE ROBERTS says:

"The vice of the position is that neither their charters nor their local franchises involve the grant of a monopoly or render competition illegal. The franchise to exist as a corporation, and to function as a public utility, in the absence of a specific charter contract on the subject, creates no right to be free of competition, and affords the corporation no legal cause of complaint by reason of the state's subsequently authorizing another to enter and operate in the same field. The local franchises, while having elements of property, confer no contractual or property right to be free of competition either from individuals, other public utility corporations, or the state or municipality granting the franchise. The grantor may preclude itself by contract from initiating or permitting such competition, but no such contractual obligation is here asserted."

The appellants urged also that even if the invasion of their franchise rights does not give them standing, they may, nevertheless, challenge the statutory grant of power, the exercise of which results in competition. This contention is rejected also and emphasis given to the fact that it is foreclosed by prior decisions of the Court, including the recent case of *Duke Power Company v. Greenwood County,* 302 U. S. 405. Dealing with this argument the opinion states:

"This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires,* that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria,* and will not support a cause of action or a right to sue."

The appellants also cited certain provisions of state statutes governing public utilities which they claimed conferred upon them the right to be free of competition. All of the States except Mississippi have established commissions to regulate public utilities, and in Mississippi the municipalities are authorized to regulate them. All of the States except Virginia require a public utility to obtain a certificate of convenience and necessity as a condition of doing business. The appellants commenced business in the various states before the adoption of the requirement of such certificates and none of the appellants, so far as appeared, have certificates covering their entire operations. They have, from time to time, however, obtained certificates for extensions subsequent to the enactment of statutory requirements. They claimed, nevertheless, that these laws protect them from the Authority's competition since any utility now seeking to serve in their territory must obtain a certificate and, consequently, they can maintain this suit against the Authority which has no certificate. This contention was rejected for the reason that the States may alter their policy. Commenting briefly on this and pointing out in addition that the States in which the Authority is now functioning have declared their policy with respect to the Authority, the Court says:

"The position cannot be maintained. Whether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy. That policy is subject to alteration at the will of the legislature. The declaration of a specific policy creates no vested right to its maintenance in utilities then engaged in the business or thereafter embarking in it.

"Moreover, the states in which the Authority is now functioning have declared their policy in respect of its activities. Alabama has enacted that federal agencies, instrumentalities, or corporations shall not be under the jurisdiction of its Public Service Commission; that municipalities and improvement authorities may own and operate electric generating and distributing systems and may contract with a federal agency such as the Authority for the purchase of energy, and stipulate as to the use of the energy, including rates of resale; that nonprofit membership corporations may be formed for the distribution among their members of electricity with like power to contract with the Authority for the required energy. Tennessee has amended Section 5448 of its Code, which defines public utilities, so as to exclude federal corporations such as the Authority from the jurisdiction of the State Utilities Commission; has authorized municipalities to own and operate electric generating transmission and distribution systems and to contract for power with the Authority on terms deemed appropriate, including the fixing of resale prices; has authorized the formation of nonprofit membership electric corporations with like powers to contract. Kentucky has authorized municipalities to establish and maintain light, heat, and power plants; and has provided for the organization of nonprofit cooperative electric corporations which may contract with the Authority for purchase of energy and stipulate as to resale prices. Mississippi, which has no state law for regulation of utilities, has empowered municipal and county governments to establish and maintain electric distribution systems which may buy power from the Authority and contract as to resale prices; has created a rural electrical authority and authorized the formation of power districts and nonprofit competitives, all competent to purchase energy from the Authority and distribute it and to contract with the Authority as to resale rates to consumers. The Authority's action in these states is consonant with state law, but, as has been shown, if the fact were otherwise, the appellants would have no standing to restrain its continuance.

"As the Authority has not acted in any way in North Carolina, South Carolina, Virginia or West Virginia, the appellant's contention that its proposed entry into some

or all of them confers a right to sue for an injunction against injury thereby threatened has even less support.

"The appellants may not raise any question of discrimination forbidden by the Fourteenth Amendment involved in state exemption of the Authority from commission regulation. For this reason *Frost v. The Corporation Commission*, 278 U. S. 515, on which they rely, is inapplicable. Manifestly there can be no challenge of the validity of state action in this suit. . . ."

An important and distinct ground upon which the appellants undertook to base their challenge was that the acts of the Authority cannot be upheld without permitting federal regulation of local matters reserved to the States or the people in violation of the Tenth Amendment and without sanctioning the destruction of the liberty guaranteed by the Ninth Amendment to acquire property and employ it in a lawful business. Rejecting this contention and emphasizing that the States themselves are raising no objection to the activities of the Authority, the Court says:

"A distinct ground upon which standing to maintain the suit is said to rest is that the acts of the Authority cannot be upheld without permitting federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment and sanctioning destruction of the liberty said to be guaranteed by the Ninth Amendment to the people of the states to acquire property and employ it in a lawful business. The proposition can mean only that since the Authority sells electricity at rates lower than those heretofore maintained by the appellants such sale is an indirect regulation of appellants' rates. But the competition of a privately owned company authorized by the state to enter the territory served by one of the appellants would, in the same sense, constitute a regulation of rates. The contention amounts to saying that competition by an individual or a state corporation is not regulation but competition by a federal agency is. In contracting with municipalities and nonprofit corporations the Authority has stipulated respecting the price at which the energy supplied shall be resold by its vendees. That is said to be a regulation of the appellant's business. But it is nothing more than an incident of competition; it is but a method of seeking and assuring a market for the power which the Authority has for sale, and a lawful means to that end. The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment. These considerations also answer the argument that the appellants have a cause of action for alleged infractions of the Ninth Amendment."

In conclusion, attention is directed to allegations of concerted action by the officers of the Authority and the Public Works Administrator alleging that the defendants have adopted an unlawful plan, have cooperated and threatened to continue to cooperate in a systematic campaign to coerce and intimidate the complainants into selling their existing systems in municipalities or territory in which the Authority desires to seize the market for electricity; that in order to make this coercion effective the Administrator has announced loans and grants of federal funds to municipalities; and that both the Authority and the Administrator have cooperated to force the municipalities to purchase the Authority's power under threats that, unless they do, proposed grants of federal money for municipal systems will not be made.

The District Court found that the Authority had not indulged in coercion, duress, fraud, or misrepresentation in its dealings with others, had not acted with malicious motive, and had not conspired with municipalities or other purchasers of power. Mr. Justice Roberts states that the record justifies such findings, and that an examination of the record disclosed that proffered evidence was properly excluded or, at the most, that the exclusion was harmless error.

In conclusion, the opinion cites findings which the appellants requested as to the alleged conspiracy between the Administrator and the Authority and observes that if such findings had been made they would not have required a conclusion that the Administrator and the Authority had acted with malicious intent to destroy the appellants' business. The views of the majority on this question were stated as follows:

"The only findings on this subject requested by the appellants were to the effect that the Public Works Administration has cooperated with and assisted the Tennessee Valley Authority in the furtherance of the latter's power program and that the former has made contracts and allotments for loans and grants to twenty-three municipalities in the states of Alabama, Mississippi, and Tennessee, amounting to about fourteen million dollars, for the purpose of constructing municipal systems to distribute the Authority's power in competition with the appellants; that the applications for loan and grant in some instances specify that the municipal system will duplicate a privately owned system; in others that a large business will be done by the municipal plants because of the low promotional rates of the Authority; that some of the applications state they were filed to take advantage of the low rates offered by the Authority and that, with few exceptions, they state that the electricity to be distributed in the city will be purchased from the Authority. A further requested finding is that the applications of certain Alabama cities recite that they have secured written contracts from practically all consumers; that these contracts refer to lower rates to be secured, provided the rates charged by the city shall be thus prescribed by the Authority for resale at retail. The court refused to make the requested findings and error is assigned to this refusal. It is apparent that if the court had made the findings no conclusion of confederation or conspiracy, with malicious intent to harm the appellants or to destroy their business, would thereby have been required.

"Cooperation by two federal officials, one acting under a statute whereby funds are provided for the erection of municipal plants, and the other under a statute authorizing the production of electricity and its sale to such plants, in competition with the appellants, does not spell conspiracy to injure their business. As the court below held, such cooperation does not involve unlawful concert, plan, or design, or cooperation to commit an unlawful act or to commit acts otherwise lawful with the intent to violate a statute."

MR. JUSTICE REED took no part in the case.

MR. JUSTICE BUTLER delivered a dissenting opinion in which MR. JUSTICE MCREYNOLDS concurred.

In his dissenting opinion MR. JUSTICE BUTLER first states the questions sought to be raised by complainants and cites the majority opinion's summary of the complainants' contention as follows:

"The decision just announced goes too far. It excludes from the courts complainants seeking constitutional protection of their property against defendants acting, as it is alleged, under invalid claim of governmental authority in setting up and carrying on a program calculated to destroy complainants' business. The issues joined by the parties, tried below and fully presented to this Court, include the question whether, when construed to authorize the things done and threatened by defendants, the challenged enactment is authorized by the Constitution or repugnant to the Fifth, Ninth, and Tenth Amendments. The issues also include the question whether, as being applied, the Act is void because the execution of defendants' program will deprive complainants of their property without due process of law in contravention of the Fifth

Amendment. This Court holds complainants have no standing to challenge the validity of the Act and puts aside as immaterial their claim that by defendants' unauthorized acts their properties are being destroyed.

"The opinion states: 'The Authority's acts which the appellants claim give rise to a cause of action, comprise (1) the sale of electrical energy at wholesale to municipalities empowered by state law to maintain and operate their own distribution systems; (2) the sale of such energy at wholesale to membership corporations organized under state law to purchase and distribute electricity to their members without profit; (3) the sale of firm and secondary power at wholesale to industrial plants.'"

The dissenting opinion then urges that the substance of the complainants' case may not be so compressed. A summary of the complaint then follows in which the following allegations, among others, are cited: The utilities generate and sell electrical energy in the various States, and are more than able to fill the needs of the territory. Their properties are modern, economically operated, and valuable as going concerns. Their rates yield no more than a reasonable return, and are fully regulated by the state. The Public Works Administrator has confederated with the defendants in some acts charged to be illegal. On its face the Act discloses a purpose of authorizing numerous great works to create a vast supply of electrical power, to use the same in establishing the United States in the power business, and to dispose of the power in a manner inconsistent with the principles of our dual system, and so as to govern the concerns reserved to the States. The avowed purpose of the program is to effect a federal regulation of intrastate electric rates by a so-called "yardstick" method or "regulation by competition." The yardstick for wholesale rates is the wholesale rate charged by the Authority, but such rate is confiscatory as a measure of the complainants' rate, because it excludes the cost of the major part of the investment necessary to render the service and excludes necessary operating expenses. The yardstick for retail rates is the sum of the wholesale rate and the amount which the Authority allows municipalities to add to the wholesale rate to cover cost of local distribution; it excludes many items of necessary cost of rendering service.

There were allegations also as to the existence of a plan and systematic campaign on the part of the defendants to disrupt the business relations between the utilities and their customers; to seize their markets and to incite the local residents to cooperate with the defendants to develop an absolute monopoly; and that the defendants are attempting to coerce the complainants to sell their properties far below fair value.

In view of these and other allegations of the bill, MR. JUSTICE BUTLER concludes that the complainants are entitled to have the Court decide the constitutional questions which they have raised. This conclusion is stated as follows, in the dissenting opinion:

"Unquestionably, the bill shows that complainants are not asserting a right held or complaining of an injury sustained in common with the general public. They allege facts that unmistakably show that each has a valuable right as a public utility, non-exclusive though it is, to serve in territory covered by its franchise, and that, inevitably the value of is business and property used will suffer irreparable diminution by defendants' program and acts complained of. If, because of conflict with the Constitution, the Act does not authorize the enterprise formulated and being executed by defendants, then their conduct is unlawful and inflicts upon complainants direct and special injury of great consequence. Therefore, they are entitled to have this Court decide upon the constitutional questions they have brought here."

The case was argued by Messrs. Raymond T. Jackson and John C. Weadock for the appellants, and by Messrs. John Lord O'Brian and James Lawrence Fly for the appellees.

Sherman Anti-Trust Act—Combination in Restraint of Trade—Agreements as to Copyrighted Moving Picture Films

Agreements between distributors who own or control copyrights on moving picture films, made at the demand of exhibitors of films having a substantial monopoly of first-run theatres, whereby the distributors agree to impose restrictions on subsequent-run exhibitors forbidding them to exhibit feature films at less than a stated price or on double feature billings are in violation of the Sherman Anti-Trust Act.

A copyright on such films does not confer on the holder thereof the right to combine with other distributors to force licensees exhibiting at subsequent-run theatres to raise their prices or eliminate double feature billing in order to protect first-run exhibitors from competition by the subsequent-run exhibitors.

Interstate Circuit, Inc. et al, v. United States, 83 Adv. Op. 444; 59 Sup. Ct. Rep.....

The question in this case was whether agreements made by distributors of moving picture films imposing certain restrictions on subsequent-run moving picture theatres are in violation of the Sherman Anti-Trust Act. The distributors own or control copyrights on feature films and ship them in interstate commerce for exhibition by exhibitors. The latter own none of the copyrights, but exhibit under license agreements made with the distributors. At the demand of exhibitors operating both first and subsequent-run theatres in parts of Texas and New Mexico, and who have a substantial monopoly on first-run exhibition theatres in the area, the distributors imposed on subsequent-run exhibitors two restrictions: (1) that "A" feature pictures should never be exhibited at less than a 25c admission price in the evening; and (2) that "A" feature pictures should not be used in double billing. Both of these restrictions were important departures from previous practice, since the subsequent-run theatres had commonly exhibited the pictures in question for less than 25c at night and had used them in double billing. The restrictions went into effect for the 1934-1935 season.

In a suit brought in a Federal District Court in Texas, the defendants were found guilty of violations of the Sherman Act, by reason of agreements imposing the restrictions referred to. In an opinion by Mr. Justice Stone, the decree of the District Court was affirmed by the Supreme Court, which heard the case on two direct appeals, both of which are disposed of by the opinion.

The distributor group of defendants consisted of Interstate Circuit, Inc., Texas Consolidated Theatre, Inc. and Hoblitzelle and O'Donnell, who are respectively President and Manager of the two corporations.

The findings and conclusions of the trial court are summarized by MR. JUSTICE STONE as follows:

"The trial court found that the distributor appellants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate, and that they agreed and conspired with each other and with Interstate to impose the demanded restrictions upon all subsequent-run exhibitors in Dallas, Fort Worth, Houston and San

Antonio; that they carried out the agreement by imposing the restrictions upon their subsequent-run licensees in those cities, causing some of them to increase their admission price to 25 cents, either generally or when restricted pictures were shown, and to abandon double-billing of all such pictures, and causing the other subsequent-run exhibitors, who were either unable or unwilling to accept the restrictions, to be deprived of any opportunity to exhibit the restricted pictures, which were the best and most popular of all new feature pictures; that the effect of the restrictions upon 'low-income members of the community' patronizing the theatres of these exhibitors was to withhold from them altogether the 'best entertainment furnished by the motion picture industry'; and that the restrictions operated to increase the income of the distributors and of Interstate and to deflect attendance from later-run exhibitors who yielded to the restrictions to the first-run theatres of Interstate.

"The court concluded as matters of law that the agreement of the distributors with each other and those with Interstate to impose the restrictions upon subsequent-run exhibitors and the carrying of the agreements into effect, with the aid and participation of Hoblitzelle and O'Donnell, constituted a combination and conspiracy in restraint of interstate commerce in violation of the Sherman Act. It also concluded that each separate agreement between Interstate and a distributor that Interstate should subject itself to the restrictions in its subsequent-run theatres and that the distributors should impose the restrictions on all subsequent-run theatres in the Texas cities as a condition of supplying them with its feature pictures, was likewise a violation of the Act."

The appellants challenged the decree upon three principal grounds: (1) that the finding of agreement and conspiracy among the distributors to impose the restrictions was not supported by the subsidiary findings or the evidence; (2) that the several separate contracts made by Interstate with the distributors are within the protection of the Copyright Act, and not violative of the Sherman Act; and (3) that the restrictions do not unreasonably restrain interstate commerce within the intent of the Sherman Act.

A review of the record led to the conclusion that the findings as to conspiracy by the distributors among themselves were supported by evidence. But the opinion adds that an agreement among the distributors themselves for imposing the restrictions was not a prerequisite to an unlawful conspiracy, since the distributors knowingly adhered to and participated in the scheme. As to this MR. JUSTICE STONE says:

"While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, which, we will presently point out, was unreasonable within the meaning of the Sherman Act, and knowing it, all participated in the plan. The evidence is persuasive that each distributor early became aware that the others had joined. With that knowledge they renewed the arrangement and carried it into effect for the two successive years.

"It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

Next considered was the question whether the contracts between Interstate and the several distributors were properly enjoined or were a legitimate exercise of rights secured by copyrights held by the distributors. In dealing with this feature the opinion emphasizes that the effect of the agreements between the distributors and Interstate had no origin in the voluntary acts of the distributors to effectuate some right arising out of their copyright, but were agreements dictated by Interstate to free it from competition. In developing the view that copyrights could not validate this, MR. JUSTICE STONE says:

"The case is not one of the mere restriction of competition between the first showing of a copyrighted film by Interstate and a subsequent showing of the same film by a licensee of the copyright owner. The contract, when applied to the situation existing in the four Texas cities, had a more extensive effect. Both Interstate's first-run and second-run theatres in each of the cities regularly compete with the independent second-run theatres in those cities. Since all are in practically continuous operation during the season, competition between them extends to the exhibition of films furnished by different distributors including those of copyright owners shown by independents, which compete with those of other copyright owners shown at the same time by Interstate. Moreover, the provision in Interstate's contracts for the restriction against double billing stipulated for restraint upon competition with Interstate in the exhibition of films in the double bill in which neither Interstate nor the licensor had any interest by way of copyright or otherwise. The patent effect of the contract was to impose an undue restraint both as to admission price and the character of the exhibition upon competing theatre businesses habitually exhibiting the competitive pictures of different copyright owners. Through acceptance of its terms by the principal distributors the contract became the ready instrument by which Interstate succeeded in dominating the business of its competitors in the Texas cities. The fact that the restrictions may have been of a kind which a distributor could voluntarily have imposed, but did not, does not alter the character of the contract as a calculated restraint upon the distribution and use of copyrighted films moving in interstate commerce. Even if it be assumed that the benefit to the distributor from the restrictions is one which it might have secured through its monopoly control of the copyright alone, that would not extend the protection of the copyright to the contract with Interstate and to the resulting restraint upon the competition of its business rivals.

"A contract between a copyright owner and one who has no copyright, restraining the competitive distribution of the copyrighted articles in the open market in order to protect the latter from the competition, can no more be valid than a like agreement between two copyright owners or patentees. . . In either case if the contract is effective, as it was here, competition is suppressed and the possibility of its resumption precluded by force of the contract. An agreement illegal because it suppresses competition is not any less so because the competitive article is copyrighted. The fact that the restraint is made easier or more effective by making the copyright subservient to the contract does not relieve it of illegality."

In conclusion, the court reviews the effect of the restraints on commerce and approves the ruling of the District Court enjoining the agreements between the distributors themselves as well as their separate contracts with Interstate.

MR. JUSTICE ROBERTS delivered a dissenting

opinion in which MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concurred. In this opinion the view is taken that the evidence failed to show any conspiracy among the distributors themselves or between them and Interstate.

MR. JUSTICE ROBERTS also expresses the view that the restrictions on the licenses of second run exhibitors were not unreasonable restraints of commerce. This position is elaborated in connection with the right of the copyright owner to grant an exclusive license. In view of this right it is urged that the conditions to the grant of a license to later-run exhibitors were proper. In this connection MR. JUSTICE ROBERTS says:

"I am of opinion that the restrictions in the licenses of second run exhibitors were not unreasonable restraints of commerce under the Sherman Act. There is no contention that the action of the distributor defendants discouraged competition between them either for the business of Interstate or for that of subsequent run licensees. The restrictions upon the latter were not intended to increase license fees paid by them or those paid by Interstate; they were imposed to prevent destruction of the good will which made possible the continued exhibition of first run feature pictures and to avoid decrease of the revenue from those pictures then and theretofore enjoyed under licenses to Interstate and other first run feature exhibitors. The reasonableness of the restrictions must be judged by the situation of the industry and the propriety of its protection from practices which would seriously injure it. The question always is whether an agreement unduly restrains competition and, in applying this test, consideration must be given both to the intent and effect of the agreement in the light of realities.

"It is settled that the proprietor of a copyright may grant an exclusive license; that is, may covenant with his licensee that he will not license anyone else, as the owner of a patent may grant a similar exclusive license to make or sell the patented article. It is settled that the distributor defendants could lawfully stipulate with their licensees, whether first run or subsequent run, as to the admission price to be paid by patrons and that, so to do, would not be a violation of the Sherman Act. But it is said that if, in order to protect its earnings from first run licenses by enabling its licensees to pay the demanded consideration, the distributor agrees to restrict in anywise the exhibition of the same feature by a subsequent run exhibitor he has violated the Anti-Trust Law. In the nature of things this cannot be true. The record discloses that the distributors have always provided a so-called 'clearance' between the first run and subsequent runs of feature pictures. By this is meant that the distributors refuse to license a subsequent run theatre to show such a feature until the expiration of a given number of days or months after the picture has been shown in a first run house. This is a perfectly natural procedure and one obviously required to protect the value of the first run license. Under the decision here, however, if a distributor should agree with a first run house that if it will contract for a given feature picture at a given price the distributor will impose a clearance on second run houses this would be a conpsiracy in restraint of trade. Other restrictions tending to preserve the value of the first exhibition of a feature picture such as those challenged in this case are just as necessary and I suppose, in the absence of agreement would be held just as lawful as the restriction known as a clearance."

MR. JUSTICE FRANKFURTER took no part in the case.

The case was argued by Messrs. Thomas D. Thacher and George S. Wright for appellants and by Solicitor General Jackson for appellees.

Public Utilities—Determination of Rates—Validity of Contract to Lower Rates on Condition

A provision in a franchise to a public utility whereby it covenants to put into effect, in the city granting the franchise, rates which it puts into effect voluntarily or under compulsion in an adjacent city in another state, does not constitute an abdication or delegation of regulatory power by the city over such rates. Such a covenant on the part of the utility is consistent with the city's reservation of regulatory power, and is binding on the utility even though the city may not lawfully agree not to increase or lower the rates.

City of Texarkana, Texas v. Arkansas-Louisiana Gas Co., 83 Adv. Op. 435; 59 Sup. Ct. Rep. 448.

In this case the Court was called upon to consider the validity and applicability of Section IX of the charter granted by the petitioner, Texarkana, Texas, to the respondent in 1930. That Section reads as follows:

"If Grantee shall be finally compelled to, or should voluntarily, place [sic] in any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance then and thereupon the lessened rate shall apply in the City of Tekarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

Texarkana, Texas, and Texarkana, Arkansas, are adjacent cities divided by the Arkansas-Texas state line and respondent distributes gas in both. By virtue of Section IX the Texas city took judicial action to secure gas rates lower than those stated in other sections of the utility's franchise. The trial court, a Federal District Court in Texas, to which the case was removed from a state court, upheld Section IX as a binding contract, but thought it inapplicable to part of the time for which the City sought lower rates, allowed refund for part of the time and declared the suit premature as to still a third portion of the trial. The Circuit Court of Appeals reversed, and remanded with directions to dismiss the bill, taking the view that Section IX was an invalid abdication or delegation of the Texas city's rate-making power, since it purported to bind both parties to lower rates which might be fixed by the utility and the Arkansas city. The Court of Appeals also declared that Section IX was inapplicable, if valid.

On certiorari the decree was reversed by the Supreme Court in an opinion by MR. JUSTICE REED. The first question dealt with in the opinion is whether Section IX constituted an abdication or delegation of the power to regulate rates. On this question the Court accepts the City's position that a proper interpretation of the Section leaves the City with power to regulate the rates within the limits of constitutional provisions. MR. JUSTICE REED states:

"The city agrees that any delegation or abdication of complete power to regulate rates would be unlawful and any provision of a franchise leading to that result invalid under the decisions of Texas. It is the petitioner's position, however, that a proper interpretation of the section leaves with the city the unimpaired power to regulate the gas rates, within the limits of the applicable constitutional provisions. We agree with this analysis of the section. The words just quoted prohibiting the charge or collection of higher rates more reasonably imply a limitation on the right of the gas company to look to other provisions of the franchise for authority to exact other rates. But if this view is not accepted, it is quite clear that the charter provision 163a retaining the right to regulate must be read into the franchise. This would result in leaving in the

council of the Texas city the power to raise or lower the gas rates.

"Nor, in this view, can it be said there is delegation as distinct from abdication of the power to regulate. It is true, extra-state action determines that the rate shall lessen but the council has power over the rates at all times. The Arkansas rate is a mere measuring rod, as though the rate fluctuated with temperature or consumption. . ."

Having concluded that the City still has power to regulate the rate, the Court turned to the question whether the utility is bound to furnish gas at the lessened rate fixed in Arkansas. Applying the rule that the local law governs this question, an examination of Texas decisions led to the conclusion that the franchise is a contract with provision for rate regulation by the city, which may contain a valid covenant on the part of the utility to lower rates under specified conditions, although the city may not agree not to raise or lower rates. The Court's view on this question is stated as follows by MR. JUSTICE REED:

"We reason from these opinions that in Texas a utility franchise is a contract, with an express or implied provision that the rate schedules are subject to regulation by the city. In such a contract an agreement by the utility to lower rates under specified conditions is binding, although the rule as to the reserved power of regulation prevents the city from agreeing not to raise or lower rates. Grant of the franchise is consideration for the undertaking of the utility to maintain the prescribed rates until they are altered by the exercise of the reserved power of the municipality to regulate the rates. . ."

Finally, the Court considered the applicability of Section IX and concluded that it was intended to make applicable in the Texas city the same rates as those fixed for Arkansas consumers for similar uses and quantity of gas and for the same periods of time. Dealing with this aspect of the case the Court says, in part:

"We are of the opinion that the language of the section was intended to and does make applicable to each Texas consumer the same rates that Arkansas consumers are charged for similar uses and quantity, when the Arkansas rates are lower than the rates granted Texas consumers by the ordinance of the City of Texarkana, Texas, of June 13, 1930. This flows from the words in Section IX 'place in any rates' less than the Texas ordinance rates.

"The lower rates for Texas are to be effective only when the utility is 'finally compelled to, or should voluntarily, place in' effect the lower rates for Arkansas. When a rate is voluntarily placed in effect in Arkansas, the Texas consumers are immediately entitled to the same rate. We construe 'finally compelled' as meaning the entry by a court of the final order which makes effective a challenged rate order. No right to demand the lower rate and no cause of action to enforce the right arises until that time. When such order is entered, however, the Texas consumers are entitled to have the lowered rate applied to their consumption for the same period of time it is enjoyed by the Arkansas consumers. The purpose of the clause was to give Texas consumers the advantage of lower Arkansas rates for similar periods of time. Litigation, regardless of its merit, may not stay the beginning of the lower Texas rate. . ."

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER were for affirmance.

MR. JUSTICE FRANKFURTER took no part.

The case was argued by Mr. Benjamin E. Carter for the petitioner and by Messrs. William C. Fitzhugh and Henry C. Walker, Jr., for the respondent.

Carriers by Motor Vehicle—State Regulations to Promote Safety

The New Hampshire Act prescribing the maximum hours which drivers of motor vehicles may operate on the state's highways for hire as contract or common carriers is not repugnant to the equal protection clause of the Fourteenth Amendment by reason of exemptions accorded by the Act from its requirements.

The provisions of that Act imposing regulations to promote safety on the highways were not superseded by the Federal Motor Carrier Act of 1935, prior to the effective date of safety regulations prescribed by the Interstate Commerce Commission under the latter Act, as a substitute for state safety regulations.

Welch Co. v. New Hampshire, 83 Adv. Op. 363; 59 Sup. Ct. Rep. 438.

In this case the Court sustained the validity of a statute of New Hampshire regulating the use of motor vehicles on its highways, against challenges that certain sections of it are repugnant to the equal protection clause of the Fourteenth Amendment, and that some of its provisions had been superseded by the Federal Motor Carrier Act of 1935 and regulations of the Interstate Commerce Commission prescribed under the latter.

Section 8 makes it unlawful for any driver of a motor vehicle operated for hire as a contract or common carrier, or for the owner thereof to require or permit the driver, to operate on the State highways when the driver has been continuously on duty for more than twelve hours. If the driver has been continuously on duty for twelve hours any further operation of a motor vehicle by him on such highways is made unlawful until he shall have had at least eight consecutive hours off duty. Exemption from these requirements is accorded to those transporting manufactured products of their own, and motor vehicles not principally engaged in the transportation of property for hire or operating exclusively in a city or town or within 10 miles of its limits or beyond the 10-mile limit on not more than two trips in 30 days.

Under Section 11 the State public service commission is empowered to suspend or revoke the vehicle owner's certificate of registration, if found guilty of violations.

The appellant here is a Massachusetts corporation operating as a common and contract carrier of freight for hire by motor vehicle over public highways in Massachusetts and New Hampshire. Approximately 99 per cent of its business is interstate. After notice and hearing, the New Hampshire Commission found it guilty of violating the provisions of Section 8 of the State act and suspended its certificates for five days. The State Supreme Court upheld the challenged provisions and dismissed the appeal. On appeal to the United States Supreme Court, the judgment of the State Court was affirmed in an opinion by MR. JUSTICE BUTLER.

The first question considered in the opinion is the appellant's contention that the discrimination between drivers of motor vehicles for hire and those exempted by Sections 3 and 4 has no fair or substantial relation to highway safety. In dealing with this contention, the Court recognizes that drivers of the exempted vehicles are as susceptible to fatigue from long hours of work as are those drivers of trucks for hire and that the dangers attributable to the fatigue of drivers are the same in both classes. The Court, however, sustains the discrimination because—

"Appellant has failed to show that, in operations to which §8 applies, continuous driving for more than 12 hours is not so much more prevalent than in those exempted (§§ 3, 4) as to constitute a reasonable basis for the differentiation. We are of opinion that, for reasons given above, those stated by the state supreme court in this case and by this Court in *Dixie Ohio Express Co. v. Georgia Common*, decided this day, the classification in question does not conflict with the rule of equal protection."

The opinion also discusses the question as to whether the provisions of the State act have been superseded by the Federal Motor Carrier Act of 1935 or the regulations of the Interstate Commerce Commission made thereunder. The Federal Act became law August 9 1935, and Section 204a thereof imposes on the Commission the duty to regulate common and contract carriers by motor vehicle. It also authorizes the Commission to establish reasonable requirements with respect to the qualification and maximum hours of service of employees and safety of operation and equipment. An order of the Commission prescribing regulations as to maximum hours of service of drivers was made on December 29, 1937, but it was thereafter modified and the effective date of the regulations was postponed until January 31, 1939. The violations of the State law under consideration here all occurred prior to December 11, 1937. In these circumstances the Court concludes that there was no intention on the part of Congress to supersede any state safety measure prior to the taking effect of a federal measure found suitable as a substitute therefor. As to this question, the Court says:

"Section 204(a) definitely imposes upon the Commission the duty to 'regulate' but merely authorizes it to establish reasonable requirements with respect to, inter alia, qualifications and maximum hours of service of employees and safety of operation and equipment. The distinction intended between duty imposed and action permitted is more striking in view of the matters that along with qualifications and hours of service of drivers, are committed to the discretion of the Commission. They include transportation of baggage and express, uniform systems of accounts, records, and reports, and preservation of records.

"The roads belong to the State. There is need of local supervision of operation of motor vehicles to prevent collisions, to safeguard pedestrians, and the like. Unquestionably, reasonable regulation of periods of continuous driving is an appropriate measure. In view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed. *Mintz v. Baldwin*, 289 U. S. 346, 350. The rule applicable is clearly stated in *Ill. Cent. R. R. Co. v. Public Utilities Comm.*, 245 U. S. 493, 510: 'In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.'

* *

"Plainly Congress by mere grant of power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public using state highways."

The case was argued for the appellant by Mr. Richard F. Upton, and for the appellee by Messrs. Dudley W. Orr and John E. Benton.

Interstate Commerce—Scope of Congressional Power—Validity of Federal Tobacco Inspection Act of 1935

The Federal Tobacco Inspection Act of 1935 regulating purchases of tobacco at auctions designated under that Act by the Secretary of Agriculture, and requiring inspection and certification of tobacco at such auctions in accordance with standards fixed by him, is a valid exercise of congressional power over interstate commerce, since a large percentage of the commodity is purchased for shipment out of the state.

The Act is sustained against charges that it is discriminatory, attempts to effect an unconstitutional delegation of legislative power, and infringes the due process clause of the Fifth Amendment.

Currin et al v. Wallace et al., 83 Adv. Op. 413; 59 Sup. Ct. Rep. 379.

This case arose upon a suit brought in a Federal District Court by tobacco warehousemen and auctioneers of Oxford, North Carolina, seeking a declaratory judgment that the Federal Tobacco Inspection Act of 1935 is unconstitutional, and praying for an injunction against its enforcement. The District Court held the Act invalid and decreed as prayed in the complaint. The Circuit Court of Appeals reversed the decree, and its ruling was affirmed by the Supreme Court on certiorari, in an opinion by MR. CHIEF JUSTICE HUGHES.

The Act applies to transactions involving sales of tobacco at auction markets, in interstate commerce. Congress found that the classification of tobacco according to type, grade and other characteristics affects the price and that, without uniform standards of classification and inspection, the evaluation of tobacco is subject to speculation, manipulation and control; that unreasonable fluctuations in prices and quality determinations occur which burden interstate commerce; and that the use of uniform standards is imperative to protect producers and others engaged in commerce and to safeguard the public interest.

The Secretary of Agriculture is authorized to investigate the subject and to establish standards as to type, grade, size, condition and other characteristics, which standards are to be the official standards of the United States. He is also authorized to designate those markets where tobacco bought and sold at auction, or products customarily manufactured therefrom, move in interstate commerce, if such designation is favored by two-thirds of the growers. After designation of a market, no tobacco may be offered for sale at auction until inspected and certified by a representative of the Secretary, according to the standards. Where, by reason of lack of competent inspectors or otherwise, the Secretary is not able to provide for inspection and certification at all markets within an area, he is required to designate first those markets where the greatest number of growers may be served. Violation of the requirements concerning inspection and certification is punishable by fine or imprisonment, or both.

The opinion refers to the House Committee's Report of conditions which led to the enactment of the Act. Among the conditions reported was the fact that the buyers had possession of grade and price information which the growers lacked, whereby the latter were handicapped and farmers victimized.

Under the provisions of the Act inspectors examine the tobacco about an hour before sale and place tickets on each pile indicating its grade. Average prices for the preceding day are posted, as well as weekly reports for the preceding week. Twenty-three markets

were designated throughout the country, including three in North Carolina. In that State tobacco has been marketed on 40 auction markets.

First considered in the opinion is the petitioners' contention that the offering of tobacco for sale in warehouses is not a transaction in interstate commerce and, consequently, is beyond the reach of congressional regulatory power. In rejecting this contention the Court points to the showing of the record as to the course of the business, and states:

"The record shows that the sales consummated on the Oxford auction market are predominantly sales in interstate and foreign commerce. The principal purchasers are few in number and in the main are engaged in the export trade or in the manufacture of tobacco products in other States. It appears that in a given week, shortly before the beginning of this suit, approximately 2,000,000 pounds of tobacco were sold on the Oxford market, only 15.3 per cent of which were definitely destined for manufacture in North Carolina. About 14 per cent were in part for manufacture in North Carolina and in part for other States, and about 62 per cent moved directly into foreign commerce. The fact that the growers are not bound to accept bids, and in certain instances reject them, does not remove the auction from its immediate relation to the sales that are consummated upon the offers that the growers do accept. The auction in such cases is manifestly a part of the transaction of sale. So far as the sales are for shipment to other States or to foreign countries, it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation. Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation."

Reference is then made to the decisions of the Court sustaining the regulation of purchases of livestock and grain, and it is stated that there is no admissible constitutional theory which would include in interstate commerce purchase of those commodities for interstate transportation and deny inclusion of the purchase in the case of tobacco. Nor was the fact that interstate and intrastate sales are commingled on the tobacco market found to frustrate or restrict the exercise of congressional power. After reference to the Court's opinion in the *Shreveport Case,* 234 U. S. 342, MR. CHIEF JUSTICE HUGHES remarks that the manner of conducting business in the tobacco markets makes it necessary to apply the regulations to all sales if the interstate sales are to be regulated. Reference is also made to *Townsend v. Yeomans,* 301 U. S. 441, where tobacco warehousemen, attacking legislation of Georgia prescribing maximum charges for their services, strongly insisted that they were engaged in interstate and foreign commerce as the tobacco sold on their floors was destined for foreign or interstate shipment. In that case the Supreme Court found nothing in the Federal Act which undertook to regulate warehousemens' charges and reached the conclusion that Congress, in restricting its requirements, has left the State free to deal with matters not covered by federal legislation and not inconsistent therewith.

Consideration is also given to the contention that the Act is invalid because of its discriminatory character. In advancing this contention the petitioners pointed out that the Act leaves warehousemen at markets not designated by the Secretary of Agriculture free to conduct sales without inspection or certification. But the Court cites the inadequate number of expert inspectors as a practical difficulty in extending the regulations to all markets and emphasizes that to require Congress to establish uniform regulations and rules would impose a limitation on its power over commerce which the Constitution itself does not prescribe. It is observed that the Constitution imposes no condition of uniformity on the commerce power such as is the case with respect to the power to lay duties, imposts and excises; and, finally, that while the exercise of the power over commerce is subject to the Fifth Amendment, that Amendment, unlike the Fourteenth Amendment, contains no equal protection clause. Concluding its discussion of this feature of the case, the Court states:

"If it be assumed that there might be discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment, that is a different matter from a contention that mere lack of uniformity in the exercise of the commerce power renders the action of Congress invalid. For that contention we find no warrant. It is of the essence of the plenary power conferred that Congress may exercise its discretion in the use of the power. Congress may choose the commodities and places to which its regulation shall apply. Congress may consider and weigh relative situations and needs. Congress is not restricted by any technical requirement but may make limited applications and resort to tests so that it may have the benefit of experience in deciding upon the continuance or extension of a policy which under the Constitution it is free to adopt. As to such choices, the question is one of wisdom and not of power."

The Court also considers and rejects the petitioners' argument that the Act involves an unconstitutional delegation of legislative power. This contention has two aspects: First, that the regulations extend only to those markets wherein a designated percentage of the growers favor the designation; and second, that the powers delegated to the Secretary of Agriculture were conferred on him without adequate legislative standards for his guidance.

In conclusion, the petitioners' argument based on the due process clause of the Fifth Amendment was considered and rejected. This contention is shortly disposed of in the opinion with the following comment:

"Plaintiffs are warehousemen and auctioneers acting as agents for the growers who own the tobacco and pay their commissions. Plaintiffs are thus in the position of contesting a regulation for the benefit of their principals because of an alleged interference with their business. The Act does not affect their rate of charges and does not deprive them of any property. The growers, to be sure, may take their tobacco where they please. But even if it were assumed that the contention that the markets subject to the inspection provision would lose patronage could afford ground for resisting this sort of regulation, otherwise valid, the claim in this instance rests more on conjecture than on proof. We agree with the Circuit Court of Appeals that as to the asserted difference of prices obtainable on inspected markets, as compared with those not inspected, the evidence has little probative value and that the loss of business from growers who do not desire the inspection would seem by the record to be more than counterbalanced by the gain of business from those who desire it."

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER noted their dissent.

The case was argued by Messrs. J. C. Lanier and B. S. Royster, Jr., for the petitioners, and by Solicitor General Jackson and Mr. Robert K. McConnaughey for the respondents.

Taxation—State Tax on Use of Tangible Personal Property—Validity as to Property Used by Interstate Railway

The California Use Tax Act of 1935, which is complemental to the State's Retail Sales Tax of 1933, and which imposes a tax on the use or consumption of tangible personal property in the state at the same rate as the Sales Tax on the same kind of property sold at retail in the state, is valid as applied to property stored or used in the state by railroads engaged in interstate commerce. The tax is not invalid as an undue burden on interstate commerce, since the taxable event is the storage and exercise of rights incidental to ownership after interstate shipment has ended and before consumption in interstate commerce had begun.

Southern Pacific Co. v. Gallagher, et al, 83 Adv. Op. 352; 59 Sup. Ct. Rep. 389.

This case arose in a suit by the Southern Pacific Company to enjoin enforcement of the California Use Tax Act of 1935. That Act is complemental to the State's Retail Sales Act. The latter levies a tax upon the gross receipts of California retailers, and the Use Tax Act imposes an excise on the consumer at the same rate for storage, use or other consumption in the state of such property when purchased from any retailer. The Use Tax Act exempts from its levy all property covered by the Sales Tax.

A Federal District Court of three judges sustained the tax against the petitioner's charge of unconstitutionality and dismissed the complaint on final hearing. On appeal, this ruling was affirmed by the Supreme Court in an opinion by MR. JUSTICE REED.

His opinion summarizes the effect of the scheme of taxation embraced in the two Acts, as follows:

"As property covered by the sales tax is exempt under the use tax, all tangible personalty sold or utilized in California is taxed once for the support of the state government. Definitions in the Use Tax of taxpayer, retailer, storage and use are designed to make the coverage complete. A retailer is 'every person, engaged in the business of making sales for storage, use or other consumption'; use is the exercise of any right or power incident to ownership, except sale in the regular course of business; storage is any 'keeping or retention' with a similar exemption; and a taxpayer includes everyone 'storing, using or otherwise consuming' the property subject to the use tax."

The Southern Pacific contended that the use tax could not be applied constitutionally to tangible personal property embracing equipment, machinery, tools and office supplies purchased outside the state and held for short terms prior to ultimate use and consumption in the railroad's interstate transportation business.

After a review of the authorities, the Court concludes that tax is valid under that line of authority which sustains the view that use and storage, as defined in the Act, are taxable intrastate events, separate from interstate commerce. In this connection MR. JUSTICE REED says:

"The second line of authority supports the view that use and storage as defined in the California act are taxable intrastate events, separate and apart from interstate commerce. A recent discussion of the topic sets out the precedents in support of a ruling that a tax upon the production of power by the use of which compressors drove natural gas in interstate commerce is valid. Such production is a taxable event distinct from its consumption in commerce. Particular attention is called by the state to the *Wallace* case. There the tax was on 'selling or storing or distributing gasoline.' It became due on withdrawal from storage. The tax was held applicable to gasoline, purchased out of the state and stored in the state 'when all is withdrawn and used . . . as a source of motive power in interstate railway operation' and valid against the objection that 'it is in effect a tax upon the use' in interstate commerce. The invalidity of such a tax arises from a levy on commerce itself or its gross receipts, not upon events prior to the commerce.

The principle illustrated by the *Helson* case forbids a tax upon commerce or consumption in commerce. The *Wallace* case, and precedents analagous to it, permit taxation of events preliminary to interstate commerce. The validity of any application of a taxing act depends upon a classification of the facts in the light of these theories. In the present case some of the articles were ordered out of the state under specification suitable only for utilization in the transportation facilities and installed immediately on arrival at the California destination. If articles so handled are deemed to have reached the end of their interstate transit upon 'use or storage,' no further inquiry is necessary as to the rest of the articles which are subjected to a retention, by comparison, farther removed from interstate commerce. We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun. *Champlain Co.* v. *Brattleboro* and *Carson Petroleum Co.* v. *Vial* are therefore inapplicable. *Bacon* v. *Illinois,* where taxation of grain during stoppage in transit was validated, presents a closer analogy. 'Practical continuity' does not always make an act a part of interstate commerce. This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed. It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation. This is not significant. The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress."

MR. JUSTICE BLACK concurred in the result. MR. JUSTICE ROBERTS did not participate.

MR. JUSTICE BUTLER, dissenting, said:

"The facts stated in the opinion just announced leave nothing of substance to support its conclusion that the California tax is not upon the operation—maintenance and use—of appellant's railroad for interstate transportation. Discussion can neither obscure nor more plainly disclose the truth that the tax in question directly burdens commerce among the States. Concededly, that is repugnant to the commerce clause as, from the beginning, it has been construed by this Court."

MR. JUSTICE MCREYNOLDS concurred with MR. JUSTICE BUTLER.

The Court also sustained the tax against a challenge to its validity made by the Pacific Telephone and Telegraph Company, in No. 213, in an opinion by MR. JUSTICE REED, which notes that there are no material distinctions between the Telegraph Company's contentions and those of the Railway.

The case was argued by Mr. Harry H. McElroy for the appellant and by Mr. H. H. Linney for the appellees.

SUMMARIES

Federal Courts—Application of State Law—"Law of Case" as Declared by State Supreme Court

Wichita Royalty Co. v. City Natl. Bank of Wichita Falls, 83 Adv. Op. 383; 59 Sup. Ct. Rep. 420. (No. 314, decided January 30, 1939.)

Certiorari to review a decision of the Circuit Court of Appeals (Fifth Circuit) setting aside a decree of a federal District Court in Texas. The case involved a question as to the extent of liability of a bank and its vice-president in charging the account of one Peckham, a former trustee of petitioner, who in breach of trust had drawn on trust funds in the bank in part to pay his own debts to the bank and its vice-president, and in part for other expenditures for his own benefit.

In an action and a cross-action between the bank and the petitioner association, in the courts of Texas, the Supreme Court of that State reversed a judgment in favor of the bank and remanded the cause for a new trial. In its opinion it stated the applicable principles of law for the guidance of the trial court. Meanwhile the bank became insolvent, and the cause was removed to a Federal District Court. There, after trial, the court denied recovery to the association on its claim against the old bank. On appeal the Circuit Court reversed with a statement of principles for guidance of the District Court. These were at variance with the principles enunciated by the Texas Supreme Court.

On certiorari, the Supreme Court, in an opinion by MR. JUSTICE STONE, states that the Texas law governs, and that its statement in the case at bar is binding on the Federal Courts, unless the Supreme Court of Texas has since overruled its earlier pronouncement. On an examination of a Texas case which the Circuit Court thought had modified the earlier pronouncement, the Supreme Court concludes to the contrary and reverses the decree and remands the case for further proceedings in accordance with the opinion.

The case was argued by Messrs. Ray Bland and Guy Rogers for the petitioners, and by Messrs. Leslie Humphrey and T. R. Boone for the respondents.

Habeas Corpus—Scope of Writ—Jurisdiction of United States Over Chickamauga National Park

Bowen v. Johnston, 83 Adv. Op. 421; 59 Sup. Ct. Rep. 442. (No. 359, decided January 30, 1939.)

Certiorari to review a judgment of the Circuit Court of Appeals (Ninth Circuit) affirming an order of the District Court of Northern California denying petitioner's petition for a writ of *habeas corpus.* Petitioner was convicted in a Federal District Court in Georgia of a murder committed in the Government Reservation known as the Chickamauga and Chattanooga National Park. He was sentenced to life imprisonment and is confined in the prison at Alcatraz, California.

He presented a petition for *habeas corpus* to the District Judge in the Northern District of California alleging that the indictment was void, and that no legal judgment could be based thereon, as it failed to show jurisdiction over person and subject matter, and alleging that the United States did not have exclusive jurisdiction of the subject matter.

The Supreme Court, in an opinion by MR. CHIEF JUSTICE HUGHES, differs from the Circuit Court as to whether the question of exclusive federal jurisdiction was open to challenge on a petition for *habeas corpus* in the District Court of California, and concludes that the question could be properly raised in the latter court on such petition.

The Georgia statutes are then examined to determine whether the United States did acquire exclusive jurisdiction over the Park. These are construed as giving the United States such jurisdiction, and the order affirming the denial of the petition for *habeas corpus* is affirmed.

The case was argued by Mr. Seth W. Richardson for the petitioner, and by Mr. Bates Booth for the respondent.

Patents—Validity—Infringement

Mackay Radio and Telegraph Company v. Radio Corporation of America, 83 Adv. Op. 375; 59 Sup. Ct. Rep. 427. (No. 127, decided January 30, 1939.)

This case presented questions as to whether the Carter patent, No. 1,974,387, of September 18, 1934, for a directive antenna system for radio communication is valid and infringed by antennae structures used by the petitioner.

The respondent brought suit in the Federal District Court for Eastern New York to enjoin infringements of four patents relating to radio antennae or their operation. Two of these were Carter patents and two were Lindenblad. Of these only the second Lindenblad patent, No. 1,927,522 of September 19, 1933, for an antenna for radio communication was considered to be of importance in the litigation. When the suit was instituted application for the third Carter patent, involved here, was pending. After the petitioner had answered and respondent, as a result of the litigation, had acquired knowledge of the particulars of the structure and operation of the petitioner's antennae, Carter amended the statement of his invention in his application to embrace a differentiating feature of petitioner's structures. After issuance of this patent respondent was permitted to file a supplemental bill charging its infringement. The suits were consolidated and tried on the issues of validity and infringement of all five patents.

The District Court found no infringement of any of the patents and decreed for the defendants. On appeal the Circuit Court of Appeals (2nd Circuit) reversed as to Claims 15 and 16 of the Carter patent, holding that it was valid and infringed. On certiorari, the Supreme Court in an opinion by MR. JUSTICE STONE reversed as to this portion of the decree of the Circuit Court.

The Court points out that the formula in Claims 15 and 16 of the Carter patent so far as they claim antennae of wire lengths intermediate of multiples of half wave lengths they are invalid, and that so far as the patent claims conformity to the earlier formula of Abraham, the petitioner's structures do not infringe, as none of them conform to the Abraham formula.

MR. JUSTICE ROBERTS did not participate.

The case was argued by Mr. Samuel E. Darby, Jr., for the petitioner, and by Mr. Jo. Bailey Brown for the respondent.

Copyrights—Deposit of Copies Under Section 12 of Copyright Act of 1909—Effect of Delay in Depositing

Washingtonian Publishing Co. v. Pearson, et al., 83 Adv. Op. 387; 59 Sup. Ct. Rep. 397. (No. 222, decided January 30, 1939.)

Certiorari to review a decree of the Court of Appeals, District of Columbia, which reversed the trial court's ruling allowing petitioner's claim for damages and an injunction for alleged infringement of a copyright granted under the Copyright Act of March 4, 1909.

The petitioner published an article December 10, 1931, and claimed copyright thereon by printing thereon the required statutory notice of copyright. In August, Liveright, Inc., published a book written by two of the respondents and printed by another containing material substantially identical with the article published with notice of copyright in December, 1931.

Petitioner deposited copies in the Copyright Office February 21, 1933, and obtained a certificate of registration. March 8, 1933, the suit for infringement was instituted.

The Supreme Court, in an opinion by MR. JUSTICE MCREYNOLDS, holds that the claim of copyright came to fruition upon the publication with notice of copyright, and that the delay in depositing copies in the Copyright Office, in compliance with the requirement of Section 12 of the Act that two copies "shall be *promptly* deposited" in the Copyright Office, does not bar suit for damages for infringement prior to deposit, if the requisite copies have been deposited before the suit is commenced.

MR. JUSTICE BLACK delivered a dissenting opinion in which MR. JUSTICE ROBERTS and MR. JUSTICE REED concurred.

The case was argued by Mr. Horace S. Whitman for the petitioner and by Mr. Eliot C. Lovett for the respondents.

State Taxation—Use Taxes—Commerce Clause—Due Process

Felt and Tarrant Manufacturing Co. v. Gallagher, et al. 83 Adv. Op. 361; 59 Sup. Ct. Rep. 376. [No. 302, decided January 30, 1939.]

Appeal from a three judge district court to determine whether an Illinois Corporation selling its products in California through its sales agents with offices in that state may under the due process clause of the Fourteenth Amendment and under the Commerce clause of the Constitution be required, pursuant to the California Use Tax Act of 1935, to serve as an agent for collecting the tax from its California purchasers. The Use Tax Act directs retailers with a place of business in California and selling personal property there, to collect the tax which the Act imposes on the purchaser.

The Court's opinion by MR. JUSTICE MCREYNOLDS holds that the tax is not levied on the operations of interstate commerce and that for the purpose of collecting the tax the state may make the disributor its agent without violating the Constitution.

MR. JUSTICE ROBERTS did not participate.

The case was argued on December 13, 1938, by Mr. A. Calder Mackay for appellant and by Mr. James J. Arditto for appellees.

Criminal Law—Indictments—Limitations—Statutes

United States v. Durkee Famous Foods, Inc.; United States v. Manhattan Lighterage Corp.; United States v. Colgate-Palmolive-Peet Co. 83 Adv. Op. 400; 59 Sup. Ct. Rep. 456. [Nos. 309, 310, and 311, decided January 30, 1939.]

Appeals involving interpretation of the Act of May 10, 1934, which provides that when an indictment is found defective after the statute of limitations has run, a new indictment may be returned "at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session." Here an indictment under the Elkins Act was found defective after the time limitations had run and a new indictment was returned later in the same term, based on the same facts and with charges the same as those of the earlier indictment.

The Court's opinion by MR. JUSTICE MCREYNOLDS holds that a plea that the second indictment was not in time, and not in conformity with the Act of May 10, 1934, was properly sustained on the ground that the second indictment was reported at the same term at which the first was found defective, not at the succeeding one. This conclusion was reached after inspection of the Act in the light of the purposes which the letter of the Attorney General, asking Congress for its enactment, disclosed. The opinion holds that the Act was apt to express those purposes and cannot by interpretation be given another meaning.

The case was argued on January 10th and 11th, 1939, by Mr. Elmer B. Collins for appellant and by Mr. Frank M. Swacker and Mr. Roger Hinds for appellees.

Supreme Court of the United States—Jurisdiction—Direct Appeals—Statutes

Public Service Commission of Missouri, et al. v. Brashear Freight Lines, et al., 83 Adv. Op. 459; 59 Sup. Ct. Rep. —. [No. 605, decided February 13, 1939.]

Appeal from a decree of a three judge district court which denied a permanent injunction to restrain the enforcement of the Missouri Bus and Truck Act, and dismissed a counterclaim for an accounting of fees due under the act during the time a temporary restraining order, which the three judge court had previously granted to the complainant, was in effect. This appeal was taken by the defendants, to review the dismissal of their counterclaim.

The Court's *per curiam* opinion dismisses the appeal for want of jurisdiction. It concludes that § 266 of the Judicial Code which authorizes direct appeals to the Supreme Court from final decrees granting or denying interlocutory or permanent injunctions has no application and that the Supreme Court is, therefore, without jurisdiction on direct appeal to review that part of the decree which dismissed the counterclaim.

Federal Income Tax—Gross Income—Gain from Purchase and Sale of Corporate Stock by Issuing Corporation

Helvering v. R. J. Reynolds Tobacco Company. 83 Adv. Op. 370, 59 Sup. Ct. Rep. 423. [No. 328, decided January 30, 1939.]

Certiorari to determine whether gain accruing to a corporation because of purchase and resale of its own shares are gross income within the meaning of § 22(a) of the Revenue Act of 1928.

The Court's opinion by MR. JUSTICE ROBERTS finds that under Treasury regulations in force at the time of the passage of the act (T. R. 74, Art. 66), such a gain is not gross income, that repeated re-enactment of the statutory provisions which the regulation interprets gave the regulation force of law, so far as the 1928 act is concerned, and that amendment of the regulation, in 1934, after passage of the act and while

this case was pending, to the effect that such a gain is gross income can not be held to operate retroactively even though revenue acts passed after the 1934 amendment have used language identical to that under which this tax was computed and both the original and the amended regulations were issued. The opinion leaves open the question of the prospective effect of the amended regulation and subsequent re-enactments of the statutory definitions of gross income.

The case was argued on January 6, 1939, by Mr. Paul A. Freund for the petitioner and by Mr. J. G. Korner, Jr., for the respondent.

First Chrold Corporation v. Commissioner of Internal Revenue. 83 Adv. Op. 374; 59 Sup. Ct. Rep. —. [No. 385, decided January 30, 1939).]

In this opinion by MR. JUSTICE ROBERTS, § 22(a) of the Revenue Act of 1932 was construed to reach the same conclusion as in *Helvering v. R. J. Reynolds Tobacco Co.* (supra) on a similar state of facts.

The case was argued on January 6, 1939, by Mr. John E. McClure for the petitioner.

Bituminous Coal Act—Cost Reports—Confidential Reports—Jurisdiction of District Courts

Utah Fuel Company, et al., v. National Bituminous Coal Commission. 83 Adv. Op. 402; 59 Sup. Ct. Rep. 409. [No. 528, decided January 30, 1939.]

Certiorari involving the right of members of the Bituminous Coal Code to maintain a bill for injunction in the district court to restrain the Commission from making available for inspection by parties to price establishment proceedings before it, the cost returns which the producer member had filed with the Commission.

The Court's opinion by MR. JUSTICE MCREYNOLDS finds that the district court had jurisdiction to entertain the bill, but that under § 10(a) of the Act which provides that information disclosing costs of production may be made public if it is made evidence at a hearing before the Commission, Congress had authorized the Commission to make these returns available as it proposed and that § 4 Part II of the Act can not be construed as requiring that they be kept confidential. The Court, therefore, properly ordered the bill to be dismissed.

MR. JUSTICE BLACK concurred in the result on the ground that the district court was without jurisdiction.

The case was argued on January 3, 1939, by Mr. J. V. Norman for petitioner and by Mr. Solicitor General Jackson for respondent.

State Taxation, Motor Vehicles—Interstate Commerce—Equal Protection

Dixie Ohio Express Company v. State Revenue Commission of Georgia, et al. 83 Adv. Op. 367, 59 Sup. Ct. Rep. 435. [No. 260, decided January 30, 1939.]

Appeal from the Supreme Court of Georgia involving constitutionality of the Georgia Maintenance Tax Act as applied to a foreign corporation engaged exclusively in interstate transportation by motor for hire including hauling between Georgia and points in other states. The Act imposes a tax on all vehicles used on the roads of the state. The rate of tax for vehicles used for hire is substantially more than that on vehicles not so used. All proceeds are allocated to the upkeep of United States Postal roads. The carrier in this case could not use these roads under his Interstate Commerce Commission certificate. In addition to the maintenance tax, the carrier was required under Georgia law to pay substantial sums to the state for license tags, public service tags and gasoline purchases.

The Court's opinion by MR. JUSTICE BUTLER finds that the tax has not been shown to be unreasonable as a fee for the use of the Georgia roads, since the law shows that it is designed for that purpose, and not as a tax on the privilege of engaging in interstate commerce and, therefore, that it does not violate the commerce clause. The opinion also finds that difference in rates charged for vehicles used for hire and not for hire is not shown to be so unreasonable a discrimination as to violate the equal protection clause.

MR. JUSTICE BLACK concurred in the result.

MR. JUSTICE ROBERTS did not participate.

The case was argued on December 16, 1938, by Mr. Allan Watkins and Mr. Edgar Watkins for appellant and by Mr. O. H. Dukes for appellees.

Carriers—Interstate Commerce Act—Equity—Interlocutory Injunctions

Inland Steel Co. v. United States, et al; and Chicago By-Product Coke Co. v. United States et al. 83 Adv. Op. 405; 59 Sup. Ct. Rep. 415. [Nos. 227, 228, decided January 30, 1939.]

Appeals from three judge district court orders which dismissed bills in equity to restrain the enforcement of orders of the Interstate Commerce Commission that the payments to shippers by railroad companies of allowances for spotting cars in the shippers' plant violated the Interstate Commerce Act, and that the railroads cease and desist from that practice. In dismissing the bills, the district court had dissolved its interlocutory injunction under which the railroad had set up separately in its books of account all allowances that would have been payable but for the Commissions order, to await the determination of the injunction proceeding, and the court ordered the railroad to cancel the separate accounts and to retain the allowances as part of its general funds. The only question on appeal was the validity of this order to retain the allowances.

The Supreme Court's opinion by MR. JUSTICE BLACK sustains the court's order. It finds that in granting injunctive relief, the court may and should impose conditions necessary to protect both the public and the parties pending the final adjudication of the controversy, and that the order to segregate the allowances was such a condition. The opinion also examines the shippers contention that the condition was invalid under the statutory requirement that published tariffs must be observed, since after publication of new tariffs under the Commissions order, and after the Court's interlocutory injunction the railroad had republished the tariff which the Commission held illegal. The opinion rejects this contention on the ground that the republication had been made only because of the court's injunction, and that the act grants no immunity from equity to tariffs published solely because of equity intervention.

The opinion also concludes that the order which the commission entered postponing the effective date of its order to cease and desist does not deprive the court of power to enforce its interlocutory injunction, since

(*Continued on page* 251)

DECISIONS ON THE FEDERAL RULES OF CIVIL PROCEDURE

FROM BULLETINS XIV, XV, XVI AND XVII ISSUED BY THE DEPARTMENT OF JUSTICE

RULE 1—Scope of Rules

Cities Service Oil Company v. B. P. Dunlap, et al. (United States Circuit Court of Appeals, for the Fifth Circuit, SIBLEY, C. J., Jan. 23, 1939).

The question as to which party has the burden of proof on an issue of bona fide purchase for value without notice, is a matter of practice and procedure and not a matter of substantive law. This question, therefore, is not governed by decisions of state courts in accordance with the ruling in *Erie R. R. Co. v. Tompkins*, 304 U. S. 64.

RULE 2—One Form of Action

Robert Berger v. Joseph P. McHugh, et al. (Middle District of Pennsylvania, WATSON, D. J., Jan. 31, 1939).

1. The existence of an adequate remedy at law is not ground for dismissal of an action begun as a suit in equity before effective date of Rules but which came on for hearing on a motion to dismiss after September 16, 1938.

2. If a complaint is too vague to enable the defendant to prepare his answer or to prepare for trial, he should not move to dismiss but should move for a more definite statement or a bill of particulars. (Rule 12 (e))

RULE 4—Process—Subdivision (d)—Summons: Personal Service

Petition of U. S. of America to Court to Announce Rule. (Eastern District of Arkansas, TRIMBLE, D. J., Jan. 25, 1939).

The service of summons in condemnation proceedings need not be accompanied by a delivery of a copy of the complaint, as the Rules do not govern them except in respect of appeals.

Pioneer Utilities Corporation v. Scott-Newcomb, Inc. (Eastern District of New York, GALSTON, D. J., Feb. 14, 1939).

Service of summons and complaint upon a foreign corporation by delivering a copy thereof to an officer of the corporation is not effective unless the corporation is doing business within the State.

RULE 6—Time—Subdivision (b)—Enlargement

Gustavus A. Rogers v. Montgomery Ward & Co., Inc. (Southern District of New York, HULBERT, D. J., Jan. 19, 1939).

Plaintiff served a demand for trial by jury two days after the expiration of the time fixed by Rule 38 (b). *Held*, service of the demand so soon after the last day of the prescribed period indicated that the failure to serve the demand within the time specified was not intentional and motion for a jury trial was granted.

United States v. One Ford Coupe. (Middle District of Pennsylvania, WATSON, D. J., Jan. 24, 1939).

A motion to review the taxing of costs by the clerk under Rule 54 (b) was filed one day after the expiration of the specified period. Held, in the absence of a reasonable excuse for the delinquency, the motion should be dismissed.

Subdivision (c)—Unaffected by Expiration of Term

John S. Sorenson et al v. Howard Sutherland, et al. (Southern District of New York, GODDARD, D. J., Jan. 30, 1939).

Rule 6 (c) providing that "the expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in a civil action which is pending before it" is not applicable to a motion filed prior to the effective date of the Federal Rules of Civil Procedure to vacate a decree entered in 1929. (Rule 86)

RULE 7—Subdivision (a)—Pleadings

Harry Fried v. Warner Brothers Circuit Management Corp. et al. (Eastern District of Pennsylvania, KIRKPATRICK, D. J., Jan. 25, 1939).

1. A bill in equity for an injunction filed after the effective date of the Federal Rules of Civil Procedure will be considered a complaint in a civil action.

2. Motion by defendant for a bill of particulars will not be granted before answer if it does not aid the expeditious disposition of the case and if the complaint states the facts with sufficient particularity to enable the defendant to answer. (Rule 12 (e))

Subdivision (b)—Motions and Other Papers

Isabelle Hammond-Knowlton v. The Hartford Connecticut Trust Co. (District of Connecticut, THOMAS, D. J., Feb. 3, 1939).

A motion to dismiss may not be made orally during the argument on another motion, but must be made in writing.

Subdivision (c)—Demurrers, Pleas, Etc., Abolished

George Alfred Sullivan v. United States. (Eastern District of Kentucky, ——— Jan. 28, 1939).

Demurrer filed prior to effective date of the Rules, on the ground that the action was barred by the Statute of Limitations, was treated as a motion to dismiss for lack of jurisdiction under Rule 12 (b).

[Editor's note: The question as to what should

be done with demurrers, in view of their abolition by the new rules, has been variously dealt with. In *New York Life Insurance Co. v. Coldiron* (W. Wash. Oct. 6, 1938), a demurrer was stricken (Bulletin No. 2). In that case, however, it did not appear whether the demurrer was filed prior or subsequently to the effective date of the Rules. In *Shell Petroleum Corporation v. Stueve* (Minn. Dec. 12, 1938) a demurrer was treated as a motion for a more definite statement of the claim (Bulletin No. 9). In *Ashman v. Coleman* (W. Pa. Oct. 24, 1928; Bulletin No. 2), and in *Lewis v. United States* (E. Tenn. Dec. 16, 1938; Bulletin No. 10), a demurrer was treated as a motion to dismiss for failure to state a claim. In *Equitable Life Assurance Society v. Kit, et al.* (E. Pa. Jan. 9, 1939), a demurrer was treated as a motion for judgment on the pleadings (Bulletin No. 13). In the instant case (*George Alfred Sullivan v. United States*), a demurrer was treated as a motion to dismiss for lack of jurisdiction.]

RULE 8—General Rules of Pleading—Subdivision (a)—Claims for Relief

Nester et al. v. Western Union Telegraph Co., et al. (Southern District of California, Central Division, YANKWICH, D. J., Nov. 9, 1938).

Although plaintiff in an action sounding in tort may not be able to prove special damages pleaded by him, he may, nevertheless, recover for breach of the contract if he is shown by the evidence to be entitled to such recovery.

RULE 9—Pleading Special Matters—Subdivision (b)—Fraud, Mistake, Condition of the Mind

E. I. Du Pont De Nemours & Co. v. Dupont Textile Mills, Inc. (Middle District of Pennsylvania, WATSON, D. J., Feb. 6, 1939).

Although fraud may not be alleged generally, intent may be so alleged and defendant is not entitled to further particulars as to its own fraudulent intent.

RULE 12—Defenses and Objections—Subdivision (b)—How Presented

John Molesphinx v. Theresa Bruno. (Eastern District of New York, MOSCOWITZ, D. J., Jan. 23, 1939).

After the defense of insufficiency of service of process has been disposed of on motion to quash, such defense may not be again interposed in the answer. Failure to do so does not constitute a waiver of the objection.

Subdivision (c)—Motion for Judgment on the Pleadings

Herbert W. Salus v. Federal Reserve Bank of Philadelphia. (Eastern District of Pennsylvania, KIRKPATRICK, D. J., —).

An affidavit of defense under the Pennsylvania practice raising questions of law, filed prior to the effective date of the Federal Rules of Civil Procedure, will be treated as a motion for judgment on the pleadings.

Interstate Commerce Commission v. Jacob Chester. (Eastern District of Pennsylvania, DICKINSON, D. J., Feb. 6, 1939).

Although defendant admits having committed acts sought to be enjoined, a motion for judgment on the pleadings should be denied if answer also disclaims all intention of continuing such action.

Subdivision (d)—Preliminary Hearings

Joseph H. Hawn v. American Steamship Company. (Western District of New York, KNIGHT, D. J., Jan. 13, 1939).

In an action for negligence by a seaman against a steamship company, defendant moved to dismiss for lack of jurisdiction over the subject matter and submitted affidavits directed to show that plaintiff was not engaged as a seaman. Held, determination of the motion should be deferred until the trial.

Subdivision (e)—Motion for More Definite Statement or For Bill of Particulars

Edward McKenna, et al. v. United States Lines, Inc. (Southern District of New York, HULBERT, D. J., Jan. 19, 1939).

1. In an action by seamen against the owner of the vessel for an assault by other seamen, defendant's motion for a bill of particulars should be granted.

2. Apparently Rule 12 (e) was designed to avoid any distinction between a motion to make a pleading more definite and certain and a motion for a bill of particulars.

Harry Fried v. Warner Brothers Circuit Management Corp. et al. (Eastern District of Pennsylvania, KIRKPATRICK, D. J., Jan. 25, 1939).

Motion by defendant for a bill of particulars will not be granted before answer if it does not aid the expeditious disposition of the case and if the complaint states the facts with sufficient particularity to enable the defendant to answer.

E. I. Du Pont De Nemours & Co. v. Dupont Textile Mills, Inc. (Middle District of Pennsylvania, WATSON, D. J., Feb. 6, 1939).

1. On motion for more definite statement and bill of particulars in a patent infringement action, plaintiff should not be required to state where it manufactures and where it sells each of its products, nor to set forth every sale, advertisement, and letter of defendant constituting the alleged infringement.

2. A motion for more definite statement and bill of particulars requesting plaintiff to show how it computed its damages is not proper way to raise the question of jurisdictional amount.

3. Although fraud may not be alleged generally, intent may be so alleged and defendant is not entitled to further particulars as to its own fraudulent intent. (Rule 9 (b))

Robert Berger v. Joseph P. McHugh, et al. (Middle District of Pennsylvania, WATSON, D. J., Jan. 31, 1939).

If a complaint is too vague to enable the defendant to prepare his answer or to prepare for trial, he should not move to dismiss but should move for a more definite statement or a bill of particulars.

Southern Grocery Stores, Inc. v. Zoller Brewing Company. (Southern District of Iowa, Davenport Division, DEWEY, D. J., Feb. 4, 1939).

A motion for more definite statement and for a bill of particulars should be overruled if the complaint sets

forth a cause of action and the information requested can be ascertained by interrogatories under Rule 33, except that if the matters relate to jurisdiction, the motion should be sustained. (Rule 33)

Jim Tully v. William K. Howard, et al. (Southern District of New York, HULBERT, D. J., Jan. 31, 1939).

Rule 12 (e) was designed to avoid the distinction between a motion for a more definite statement and a motion for a bill of particulars. The latter motion must be made within twenty days after service of the pleading to which it is directed and will not be entertained as to the complaint, after issue is joined.

RULE 13—Counterclaim and Cross Claim—Subdivision (a)—Compulsory Counterclaims

Irving Air Chute Co., Inc. et al v. Switlik Parachute & Equipment Co. et al. (District of New Jersey, FORMAN, D. J., Feb. 14, 1939).

Defendant, in a patent infringement suit, interposed a counterclaim alleging infringement by plaintiff of a patent under which the former held an exclusive license. Owner of the legal title to the patent involved in the counterclaim was later made a defendant. Thereafter the latter conveyed its interest in the patent to the defendant licensee. Defendant then sought leave to file a supplemental counterclaim alleging infringement of other patents. Held, the motion for leave to file a supplemental counterclaim should be denied, as the matters were not covered by original complaint and counterclaim.

Subdivision (c)—Counterclaim Exceeding Opposing Claim

Dewey & Almy Chemical Company v. Johnson, Drake & Piper, Inc.; Dewey & Almy Chemical Company v. Andrew Weston Co., Inc. (Eastern District of New York, CAMPBELL, D. J., Jan. 23, 1939).

In a patent suit it is proper to counterclaim for a declaratory judgment to have the patent held invalid and non-infringed.

Plaintiff by coming voluntarily into a District Court, subjects himself to the jurisdiction of that court in respect to all possible grounds of counterclaim.

Subdivision (h)—Additional Parties May Be Brought In

Dewey & Almy Chemical Company v. Johnson, Drake & Piper, Inc.; Dewey & Almy Chemical Company v. Andrew Weston Co., Inc. (Eastern District of New York, CAMPBELL, D. J., Jan. 23, 1939).

Even in the absence of diversity of citizenship, a counterclaim may be maintained against plaintiff for unfair competition arising out of the transactions set forth in the complaint.

Subdivision (i)—Separate Trials; Separate Judgments

Dewey & Almy Chemical Company v. Johnson, Drake & Piper, Inc.; Dewey & Almy Chemical Company v. Andrew Weston Co., Inc. (Eastern District of New York, CAMPBELL, D. J., Jan. 23, 1939).

A motion by plaintiff for a separate trial of the cause of action set forth in a counterclaim should not be made before he has replied.

RULE 14—Third-Party Practice—Subdivision (a)—When Defendant May Bring in Third Party

Dewey & Almy Chemical Company v. Johnson, Drake & Piper, Inc.; Dewey & Almy Chemical Company v. Andrew Weston Co., Inc. (Eastern District of New York, CAMPBELL, D. J., Jan. 23, 1939).

1. In an action for infringement of a patent, a third-party complaint may be maintained for alleged violations of the Clayton Act. Personal service prior to the filing of the third-party complaint is not requisite to jurisdiction over such third-party defendants. Under the Clayton Act jurisdiction can be obtained by service upon them in any district in which they are doing business.

2. A third-party complaint may be maintained jointly against the third-party defendant and the original plaintiff.

3. Even in the absence of diversity of citizenship, a counterclaim may be maintained against plaintiff for unfair competition arising out of the transactions set forth in the complaint. (Rule 13 (h))

4. In a patent suit it is proper to counterclaim for a declaratory judgment to have the patent held invalid and non-infringed. (Rule 13 (c))

5. Plaintiff by coming voluntarily into a District Court, subjects himself to the jurisdiction of that court in respect to all possible grounds of counterclaim. (Rule 13 (c))

6. A motion by plaintiff for a separate trial of the cause of action set forth in a counterclaim should not be made before he has replied (Rule 13 (i))

Zenas W. Alderman v. Whelan Drug Company, Inc. (District of Columbia, BAILEY, D. J., Jan. 24, 1939).

Although the Federal Rules of Civil Procedure contain no provision requiring a non-resident third party plaintiff to deposit security for costs, the court may order him to do so.

RULE 18—Joinder of Claims and Remedies—Subdivision (a) Joinder of Claims

J. Leonard Michelson v. Shell Union Oil Corporation. (District of Massachusetts, SWEENEY, D. J., Jan. 26, 1939).

Although the Federal Rules of Civil Procedure do not apply to proceedings in copyright, it is within the spirit of the Rules to permit the joinder of two counts in tort under the Copyright Statute with a count in contract, even though under the Conformity Act such joinder would not have been permitted. (Rule 81 (a))

RULE 20—Subdivision (a)—Permissive Joinder

Boysell Company v. Jack Franco, et al; Deltox Rug Company v. Jack Franco, et al. (Northern District of Georgia, Rome Division, UNDERWOOD, D. J., Feb. 3, 1939).

In an action for patent infringement, a corporation operated by the original defendant and alleged to be infringing the same patents, may be brought in by the plaintiff as an additional defendant.

RULE 21—Misjoinder and Non-joinder of Parties

Boysell Company v. Jack Franco, et al; Deltox Rug Company v. Jack Franco, et al. (Northern District of Georgia, Rome Division, UNDERWOOD, D. J., Feb. 3, 1939).

1. In an action for patent infringement, a corporation operated by the original defendant and alleged to be infringing the same patents, may be brought in by the plaintiff as an additional defendant. (Rule 20 (a)).

2. In an action filed before the effective date of the Rules, a motion filed after such date to join an additional party defendant, should be determined under the new Rules. (Rule 86)

RULE 23—Class Actions—Subdivision (c)—Dismissal or Compromise

Edmund G. Sauer et al v. Samuel I. Newhouse et al. (District of New Jersey, FORMAN, D. J., Feb. 14, 1939).

In a representative stockholders suit against officers of the corporation the mailing to all stockholders, pursuant to the order of the court, of a copy of a rule to show cause why the suit should not be dismissed with prejudice, constitutes the notice of the proposed dismissal required by Rule 23 (c).

RULE 26—Depositions Pending Action—Subdivision (a)—When Depositions May Be Taken

Norman T. Whitaker v. MacFadden Publications, Inc. (Southern District of New York, PATTERSON, D. J., Jan. 9, 1939).

If the deposition of a party to the action is to be taken orally, it is not necessary to serve a subpoena or to pay fees and mileage. (Rule 45 (c))

Subdivision (b)—Scope of Examination

Eastern States Petroleum Co., Inc., v. Asiatic Petroleum Corp., et al. (Southern District of New York, PATTERSON, D. J., Dec. 31, 1938).

1. A witness, whose deposition is being taken orally, may be required, in the discretion of the court, to submit to inspection by examining counsel any papers produced in response to a subpoena *duces tecum*. (Rule 45 (d))

2. As a matter of discretion, the court will not permit inspection by examining counsel of papers produced in response to a subpoena *duces tecum* by a witness whose deposition is being taken and who is not a party to the action, if the papers are not admissible in evidence and their disclosure might seriously embarrass or prejudice the witness. (Rule 30(b))

RULE 30—Depositions Upon Oral Examination—Subdivision (b)—Orders for the Protection of Parties and Deponents

Eastern States Petroleum Co., Inc., v. Asiatic Petroleum Corp. et al. (Southern District of New York, PATTERSON, D. J., Dec. 31, 1938).

As a matter of discretion, the court will not permit inspection by examining counsel of papers produced in response to a subpoena *duces tecum* by a witness whose deposition is being taken and who is not a party to the action, if the papers are not admissible in evidence and their disclosure might seriously embarrass or prejudice the witness.

RULE 31—Depositions of Witnesses Upon Written Interrogatories—Subdivision (a)—Serving Interrogatories; Notice

Laura Rowe v. Union Central Life Insurance Company. (District of Columbia, BAILEY, D. J., Jan. 25, 1939).

Defendant's attorney may refuse to answer questions as to the identity and location of witnesses if the only information he has was obtained from the defendant and hence is confidential and privileged.

RULE 33—Interrogatories to Parties

Southern Grocery Stores, Inc., v. Zoller Brewing Company. (Southern District of Iowa, Davenport Division, DEWEY, D. J., Feb. 4, 1939).

A motion for more definite statement and for a bill of particulars should be overruled if the complaint sets forth a cause of action and the information requested can be ascertained by interrogatories under Rule 33, except that if the matters relate to jurisdiction, the motion should be sustained.

RULE 34—Discovery and Production of Documents and Things for Inspection, Copying, or Photographing

Oskar Piest v. Tide Water Oil Company et al. (Southern District of New York, COXE, D. J., Dec. 20, 1938).

Discovery of documents should not be permitted until answer is filed since until issue is joined it cannot be determined whether or not the requested documents contain evidence material to any issue.

Nuri Beler et al v. Savarona Ship Corporation et al. (Eastern District of New York, MOSCOWITZ, D. J., Feb. 10, 1939).

1. A party seeking a discovery of documents need not prove their materiality, but need only establish that it is reasonably probable that the documents constitute or contain material evidence.

2. Stipulation by the parties requiring the production, and permitting the inspection of, certain books, records and documents, constitutes a waiver of the requirement of showing reasonable probability of materiality.

Margaret T. Bough et al v. James B. Lee et al. (Southern District of New York, HULBERT, D. J., Feb. 2, 1939).

1. A party may not be compelled to produce papers, etc., not in his own possession.

2. Although a subpoena for the production of documents under Rule 45 may be procured and served on the attorney for a party, he has the right to a determination by the court of the question of privilege. (Rule 45 (b))

United States v. Aluminum Company of America et al. (Southern District of New York, CAFFEY, D. J., Feb. 9, 1939).

A motion under Rule 45 (b) to quash a subpoena for the production of documents on the ground that such subpoena is unreasonable and oppressive, should be granted in the absence of a showing that the documents called for are material or probably material. The limitations of Rule 34 are equally applicable to subpoenas issued under Rule 45 (b).

RULE 36—Admission of Facts and of Genuineness of Documents

Mabelle Walsh v. The Connecticut Mutual Life Insurance Co. (Eastern District of New York, MOSCOWITZ, D. J., Jan. 30, 1939).

1. A party served with a request for admissions of fact is deemed to have admitted all relevant facts if he does not within the time allowed by the Rules specifically deny them or set forth reasons why he cannot truthfully admit or deny them.

2. The word "therein" in the first sentence of Rule 36 (a) refers to matters of fact relevant to the pleadings and contained in the request for admissions and does not refer merely to matters of fact set forth in a document concerning which an admission of genuineness is requested.

3. Summary judgment may be granted if the facts which stand admitted by reason of a party's failure to deny statements contained in a request for admissions show that no material issue of fact exists. (Rule 56)

RULE 38—Jury Trial of Right—Subdivision (a)—Right Preserved

W. H. Hollingsworth v. General Petroleum Corp. of California. (District of Oregon, McCOLLOCH, D. J., Jan. 31, 1939).

An issue of "fraud in the consideration" given for a release is not triable by a jury as of right.

Subdivision (b)—Demand

Gustavus A. Rogers v. Montgomery Ward & Co., Inc. (Southern District of New York, HULBERT, D. J., Jan. 19, 1939).

Plaintiff served a demand for trial by jury two days after the expiration of the time fixed by Rule 38 (b). *Held,* service of the demand so soon after the last day of the prescribed period indicated that the failure to serve the demand within the time specified was not intentional and motion for a jury trial was granted.

RULE 41—Dismissal of Actions Subdivision (a)—Voluntary Dismissal: Effect Thereof

Patrick J. Delahanty et al v. Newark Morning Ledger Company. (District of New Jersey, FORMAN, D. J., Feb. 14, 1939).

A representative stockholders' suit which has proceeded to final hearing should not be dismissed without prejudice on motion by plaintiff under Rule 41 (a) (2), after officers of defendant have been examined under widest latitude, employees of defendant company called to testify, and the defendant has been obliged to make preparations for the trial.

RULE 45—Subpoena—Subdivision (b)—For Production of Documentary Evidence

United States v. Aluminum Company of America et al. (Southern District of New York, CAFFEY, D. J., Feb. 9, 1939).

1. A motion under Rule 45 (b) to quash a subpoena for the production of documents on the ground that such subpoena is unreasonable and oppressive, should be granted in the absence of a showing that the documents called for are material or probably material. The limitations of Rule 34 are equally applicable to subpoenas issued under Rule 45 (b).

2. Documents produced in response to a subpoena should be examined by the court, before submission to opposing counsel, and a hearing granted to the producing party on the question as to whether they contain evidence which is material or probably material.

Margaret T. Bough, et al. v. James B. Lee, et al. (Southern District of New York, HULBERT, D. J., Feb. 2, 1939).

Although a subpoena for the production of documents under Rule 45 may be procured and served on the attorney for a party, he has the right to a determination by the court of the question of privilege.

Subdivision (c)—Service

Norman T. Whitaker v. MacFadden Publications, Inc. (Southern District of New York, PATTERSON, D. J., Jan. 9, 1939).

If the deposition of a party to the action is to be taken orally, it is not necessary to serve a subpoena or to pay fees and mileage.

Subdivision (d)—Subpoena for Taking Depositions; Place of Examination

Eastern States Petroleum Co., Inc. v. Asiatic Petroleum Corp., et al. (Southern District of New York, PATTERSON, D. J., Dec. 31, 1938).

A witness, whose deposition is being taken orally, may be required, in the discretion of the court, to submit to inspection by examining counsel any papers produced in response to a subpoena *duces tecum.*

RULE 54—Judgments; Costs—Subdivision (d)—Costs

United States v. One Ford Coupe. (Middle District of Pennsylvania, WATSON, D. J., Jan. 24, 1939).

A motion to review the taxing of costs by the clerk under Rule 54 (d) was filed one day after the expiration of the specified period. *Held,* in the absence of a reasonable excuse for the delinquency, the motion should be dismissed.

RULE 56—Summary Judgment

Edward E. Boerner v. United States. (Eastern District of New York, MOSCOWITZ, D. J., Jan. 30, 1939).

1. Summary judgment procedure may be invoked in a suit against the United States under the Tucker Act.

2. A motion for a summary judgment will not be granted, if there is an issue of fact to be tried.

3. On a motion for summary judgment the court should disregard all statements based upon hearsay in the supporting and opposing affidavits. (Rule 56 (e))

The Refractolite Corporation v. Prismo Holding Corporation et al. (Southern District of New York, COXE, D. J., Dec. 20, 1938).

Summary judgment should not be granted in a patent suit in which the issues involve the validity and alleged infringement of unadjudicated patents.

Mabelle Walsh v. The Connecticut Mutual Life Insurance Co. (Eastern District of New York, MOSCOWITZ, D. J., Jan. 30, 1939).

Summary judgment may be granted if the facts which stand admitted by reason of a party's failure to deny statements contained in a request for admissions show that no material issue of fact exists.

Subdivision (b)—For Defending Party

Mitchell A. Mabardy v. Railway Express Agency, Inc. (District of Massachusetts, MCLELLAN, D. J., Jan. 17, 1939).

In an action against a master for negligence of his servant, a prior judgment in favor of the servant

against the same plaintiff may be pleaded as *res adjudicata*. Motion for summary judgment showing the foregoing by affidavit was granted.

Julie Means v. MacFadden Publications, Inc., et al. (Southern District of New York, CONGER, D. J., Jan. 12, 1939).

Motion for summary judgment dismissing certain causes of action should be granted if it appears from the pleadings that such causes are barred by the Statute of Limitations.

Subdivision (c)—Motion and Proceedings Thereon

United States v. James J. McCulloch, et al. (Eastern District of New York, GALSTON, D. J., Jan. 24, 1939).

The Federal Housing Administration insured payment of a promissory note given to a bank to enable the makers to buy an oil burner. On default by makers, payee obtained from the Government payment of the balance due and endorsed the note over to it. In an action on the note by the Government, defendant's answer alleged that the oil burner was defective and that plaintiff was not a holder in due course. *Held*, pleadings, depositions and affidavits on file showed no genuine issue as to any material fact and plaintiff's motion for summary judgment was granted.

Subdivision (e)—Form of Affidavits; Further Testimony

Edward E. Boerner v. United States. (Eastern District of New York, MOSCOWITZ, D. J., Jan. 30, 1939).

On a motion for summary judgment the court should disregard all statements based upon hearsay in the supporting and opposing affidavits.

RULE 59—New Trials—Subdivision (b)—Time for Motion

Nachod & United States Signal Company, Inc. et al. v. Automatic Signal Corporation, et al. (District of Connecticut, HINCKS, D. J., Jan. 18, 1939).

A bill of complaint was dismissed for defect of parties defendant. Later defendant filed motion to vacate the order, in that it was based on an erroneous conclusion of law. *Held*, the motion should be denied, as more than ten days had expired between the entry of the decree and the filing of the motion.

RULE 81—Applicability in General

Petition of United States of America to Court to Announce a Rule. (Eastern District of Arkansas, TRIMBLE, D. J., Jan. 25, 1939).

The service of summons in condemnation proceedings need not be accompanied by a delivery of a copy of the complaint, as the Rules do not govern them except in respect of appeals. (Rule 4(d))

Subdivision (a)—To What Proceedings Applicable

J. Leonard Michelson v. Shell Union Oil Corporation. (District of Massachusetts, SWEENEY, D. J., Jan. 26, 1939).

Although the Federal Rules of Civil Procedure do not apply to proceedings in copyright, it is within the spirit of the Rules to permit the joinder of two counts in tort under the Copyright Statute with a count in contract, even though under the Conformity Act such joinder would not have been permitted.

RULE 83—Rules by District Courts

W. J. Schuldt and O. H. Bailey v. Frederick W. P. Schumann. (Western District of Washington, Southern Division, CUSHMAN, D. J., Jan. 17, 1939).

A local rule providing that non-resident plaintiffs may be required to file security for costs, is not inconsistent with Federal Rules of Civil Procedure, and is, therefore, valid.

Arthur G. Leake v. New York Central Railroad Co. (Northern District of New York, COOPER, D. J., Jan. 26, 1939).

Although the Federal Rules of Civil Procedure contain no provision requiring non-resident plaintiffs to file security for costs, the court may order the plaintiff to give security.

Zenas W. Alderman v. Whelan Drug Company, Inc. (District of Columbia, BAILEY, J., Jan. 24, 1939).

Although the Federal Rules of Civil Procedure contain no provision requiring a non-resident third party plaintiff to deposit security for costs, the court may order him to do so. (Rule 14 (a))

RULE 86—Effective Date

Hadley Falls Trust Co. v. United States. (District of Massachusetts, MCLELLAN, D. J., Sept. 22, 1938); *Sumner Pingree et al v. Thomas B. Hassett.* (District of Massachusetts, SWEENEY, D. J., Sept. 27, 1938); *Henry Condon Sawler v. United States.* (District of Massachusetts, SWEENEY, D. J., Sept. 29, 1938).

In cases which were heard and decided before the effective date of the Rules, and bills of exceptions seasonably filed, agreed upon or allowed, it was held that the application of the new Rules to the appeals in such cases would not be feasible or would work injustice, and that the former procedure on appeal should apply.

Gene Buck, et al v. Trianon Company, Inc.; Gene Buck, et al v. Nelly Cleveland; Gene Buck, et al v. W. L. Scribner; Gene Buck, et al v. John G. Lockhart, et al; Gene Buck, et al v. Terry Inn, Inc. (Western District of Washington, Northern Division, CUSHMAN, D. J., Jan. 26, 1939).

In a case in which issue was joined and rulings were made prior to the effective date of the Federal Rules of Civil Procedure, holding that certain counterclaims could not be interposed and certain claims could not be joined, such rulings will not be changed, even though had the new Rules been in effect at the time of the original determination, a different result might have been reached.

New York Life Insurance Co. v. Harold Morris et al. (Western District of Pennsylvania, SCHOONMAKER, D. J., Jan. 27, 1939).

An equity suit in which a motion to dismiss was set down for hearing prior to the effective date of the new Rules, should be concluded in accordance with the procedure in effect at the time the bill of complaint was filed.

John S. Sorenson, et al. v. Howard Sutherland, et al. (Southern District of New York, GODDARD, D. J., Jan. 31, 1939).

Rule 6 (c) providing that "the expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in a civil action which is pending before it" is not applicable to a motion filed prior to the effective date of the Federal Rules of Civil Procedure to vacate a decree entered in 1929.

Boysell Company v. Jack Franco, et al.; Deltox Rug Company v. Jack Franco, et al. (Northern District of Georgia, Rome Division, UNDERWOOD, D. J., Feb. 3, 1939).

In an action filed before the effective date of the Rules, a motion filed after such date to join an additional party defendant, should be determined under the new Rules.

James V. Martin v. Manufacturers Aircraft Association, Inc., et al. (Southern District of New York, HULBERT, D. J., Feb. 1, 1939).

The Federal Rules of Civil Procedure in regard to depositions should not be applied in an action pending on the effective date of the Rules, if it appears that proceedings in the action had been delayed for more than a year for the purpose of securing the effect of the New Rules, that even then the party failed to move until January 1939, and that depositions had been previously taken under the old procedure.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

MR. JUSTICE HOLMES AND THE SUPREME COURT; by Felix Frankfurter. 1938. Cambridge, Mass.; Harvard University Press. Pp. 139.—These lectures must have been exceedingly interesting to the audience when they were delivered by Professor Felix Frankfurter in April, 1938, as part of the program of the Committee on Extracurricular Reading in American History of Harvard University, but today they have an added interest for the reader as their distinguished author is now an Associate Justice of the Supreme Court. In these pages we can find not only a masterly analysis of Mr. Justice Holmes' conception of the function of the Supreme Court in interpreting the Constitution but also a guide to his successor's legal philosophy. It is, therefore, of more than academic concern to learn what the author of these lectures thought were the basic tenets of Mr. Justice Holmes' famous judgments.

These judgments, although delivered in cases which covered widely differing subject-matters, were based on certain general principles which were repeated with compelling insistence. "And so," says Mr. Justice Frankfurter, "it is perhaps more true of him than of any other judge in the history of the Court that the host of public controversies in which he participated was subdued to reason by relatively few guiding considerations." (p. 25)

These principles may be summed up under three heads. First, in interpreting those parts of the Constitution which are concerned primarily with property rights and the organization of society, the Constitution must be liberally construed so as to give the Federal Government and the individual States full power to make those experiments which they consider necessary or desirable. This doctrine was perhaps best expressed in his classic dissent in the *Lochner* case: "But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." It is, therefore, essential, as Mr. Justice Frankfurter emphasizes, for a judge to guard against the "subtle danger of the unconscious identification of personal views with constitutional sanction." (p. 34.)

Secondly, in interpreting those parts of the Constitution which are concerned primarily with what may be compendiously although inaccurately termed the Bill of Rights, Mr. Justice Holmes adopted a drastically different approach. He "attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived merely from shifting economic arrangements" (p. 51). This view found its most famous expression in his dissent in the *Schwimmer* case: "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

The apparent antinomy between these two methods of approach is reconciled by Mr. Justice Frankfurter as, in fact, expressing a single principle. "Just as he would allow experiments in economics which he himself viewed with doubt and distrust, so he would protect speech that offended his taste and wisdom. At bottom both attitudes came from a central faith and a governing scepticism." (p. 61). Similarly, "that a majority of the Court which frequently disallowed restraints upon economic power should so consistently have sanctioned restraints of the mind is perhaps only a surface paradox. There is an underlying unity between fear of ample experimentation in economics and fear of expression of heretical ideas." (p. 62.)

The third principle implicit in Mr. Justice Holmes' judgments concerned the Federal system, with special emphasis on the commerce clause, for this "has been

the most fertile source of energy for promoting the idea that, though we are a federation of states, we are also a nation." (p. 77). Here the judges must be careful to see that the national power is not "mutilated or denied by distinctions that do not respond to the actualities of modern industry." (p. 79.)

It is rare, indeed, to find the work of a great master of the law, such as Mr. Justice Holmes, so adequately pictured as it is in these comparatively few pages. It has been said of Lytton Strachey that one of his great qualities as a biographer was his ability to choose vivid quotations from the books and the letters of the persons he was portraying. Mr. Justice Frankfurter has shown the same skill in distilling for us the essence not only of Mr. Justice Holmes' legal philosophy but also of his literary genius.

A final word must be said in praise of the convenient appendices in which the range of invalidation of state legislation through the Fourteenth Amendment is set forth.

A. L. GOODHART.

Oxford, England.

Our Eleven Chief Justices, by Kenneth Bernard Umbreit. 1938. New York: Harper & Brothers. Pp. 539.—The author of this engaging book is comparatively young. He was graduated from the University of Chicago in 1927, and from the Harvard Law School in 1930. He has been a frequent contributor to this section of the JOURNAL. He tells his story of the lives of the men who have had the highest honors, from the standpoint of their inheritances and personal interests. This has not been done since George Van Santvoord and Henry Flanders wrote on the same subject more than half a century ago.

Lawyers, except the most scholarly, will enjoy it and that portion of the public whose taste have not been spoiled by highly spiced foods of the debunking order will find it an account of Americans who have left their imprint in varying degrees on the thought of the country. The author in his limited space has not been guilty of original research which often leads to pedantry, nor does he philosophize extensively. He emphasizes the fact that all the judges were human beings and that they were not any of them supermen; that they either groped their way along their paths of jurisprudence, or appeared to ride roughshod at times.

Charles Warren's more mature volumes will stand out, as will Beveridge's Marshall and Swisher's Taney, and Hart's "Life of Chase." But some of the eleven have not, except in the "Dictionary of American Biography," been made the subject of sketches that are carefully written. The present reviewer expresses the fond hope that the Bibliography at the back of the book will be read by the curious and perhaps lead some readers to further delightful studies.

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Handbook of the Cambridge Law School, 1938-1939. Cambridge, England: The University Press. This book, corresponding to the catalogues of the more important law schools in this country, gives interesting and revealing facts about the Cambridge Law School and English legal education. The Law School first flourished in the thirteenth century. Roman and Canon Law were studied until Henry VIII abolished the faculties of Canon Law. In 1800 English Law was first introduced, and now instruction is given as well in Roman-Dutch, Scots, Hindu and Mohammedan Law.

At first glance, the reader is struck by the differences in training of the lawyer by our British brethren. The courses at Cambridge are largely confined to general subjects, and are comparatively few in number. There is neither the wealth nor choice of courses for undergraduates or graduates that we have in this country. Practical training comes after graduation from "reading in chambers" as a pupil to a junior barrister for at least six months, at the Inns, or from being an apprentice or "articled clerk" to a solicitor for three years.

In this connection read the Presidential address delivered at the Law Schools at Cambridge by H. A. Hollond in July last which is printed in the current number of the Journal of the Society of Public Teachers of the Law. Mr. Hollond was at the Harvard Law School in 1913-14. He regrets that English students have no case-books, no adequate library facilities, and no required college degree preparatory to their entering upon their law studies, and that they have to depend so much in so many subjects upon what they learn after the Cambridge Law School lets them go.

MITCHELL D. FOLLANSBEE.

Chicago.

Visit, Search, and Seizure on the High Seas, by Joseph L. Frascona. Privately published. 1938. Pp. 144.—The author, Mr. Frascona, a member of the New York bar, is here proposing a convention of international law on belligerent rights at sea. The text is therefore in the form of a code, with comments upon the suggested articles. Though lawyers and scholars will argue with Mr. Frascona over many points, he is nevertheless to be commended for his bravery in venturing into one of the most troubled areas of international law and relations, and in attempting to put some order into it. Since 1920, two schools of thought have disputed vigorously over the effects of the World War upon the rules of belligerent conduct at sea, one group asserting that no change has occurred, that the law remains substantially the same, the other claiming that it is silly to consider the pre-1914 regulations as unchanged in the light of their mistreatment at the hands of both the British and the Germans. And what of the airplane? No agreement upon its belligerent and neutral use has been evolved either.

In his proposed convention Mr. Frascona goes a long way toward modifying the law in favor of British practice. He would allow search in port whenever "impracticable" upon the high seas, he would have a neutral ship "break bulk sufficiently to permit reasonable belligerent search thereof," and he would permit search of the mails in belligerent ports. To accept these propositions the United States would have to repudiate many of its stands taken from 1914-17. In justification of these projected alterations, Mr. Frascona pleads "changed conditions," and in words that would have delighted the heart of Sir Edward Grey goes on to state that "under modern conditions of war . . . it is practically impossible . . . to deal satisfactorily with neutral merchant vessels except by diverting them into . . . a belligerent port or quiet or safe waters." (p. 79).

When it comes to submarines and aircraft, however, Mr. Frascona is adamant and refuses to allow any change. There is no warrant, he says, for "any different treatment of these two new types of craft" (p. 15). Such rigidity of outlook hardly seems justified. Perhaps submarines ought to be made to behave like surface ships when meeting merchant vessels, but what of

an airplane encountering an airplane? In such instances a new technique of visit and search must come into being, with deviation inevitable. The author is not at all clear on such points, the language of his articles seeming to deal with surface ship needs almost entirely. Article XII, with its provision for belligerent supervision in neutral territory of the loading of neutral ships, has great merit and would help materially with the perplexing problem of aircraft and contraband.

Mr. Frascona has gathered together much useful data and his code should stimulate discussion of vital problems related to important American interests. His work suffers badly, however, from defects of style. The phraseology is turgid and at times is so laborious and circumlocutory that Gertrude Stein would seem the essence of clarity in comparison. For sheer obscurity and confusion the following unfortunate lines from the introduction seem unmatched, even in "Tender Buttons": "Today is the tomorrow of yesterday and tomorrow's yesterday. It is the product of a sequence and the sequence of a product. It is an integral part of the stuff of which this world is made, and advances and retards in its life as the tide changes. This tide's flux is the product of the intensity of the listening ear," etc. International law, beset by so many troubles these days, had best stick to its usual pedestrian style and avoid any tricks of verbiage.

PAYSON S. WILD, JR.

Harvard University.

La Reorganisation des Sociétés Insolvable Aux Etats Unis: Essai de Jurisprudence Comparative, par Charley del Marmol. 1938. Paris: Librairie du Recueil Sirey. (The Reorganization of Insolvent Companies in the United States; An Essay in Comparative Jurisprudence.) Pp. 316.—This is a careful, conscientious and exhaustive examination by a very competent French lawyer of the practice in the United States in respect of insolvent companies. He has taken his information not only from the legislation of Congress and the reports of cases in the courts, but also from scores of other sources, including articles in the law journals. These he has submitted to an intelligent and appreciative examination. All will not agree with some of his conclusions but all must recognize the able treatment given his subject.

He begins with the reorganization of companies not necessarily insolvent or threatened with insolvency, giving as an example the Goodyear Tire and Rubber Company in 1921, and the Westinghouse Electric and Manufacturing Company in 1907—"friendly adjustments" or "creditors' arrangements," with a glance at section 74 of the federal law of bankruptcy, very seldom appealed to. He then proceeds to discuss juridical proceedings, State receiverships, particularly under the amendments of bankruptcy law in 1933, the most interesting being in New York in respect of The Title and Mortgage Guaranty Company of Buffalo (264 N.Y. 69). Perhaps the extraordinary story of Boyd's claim against the Coeur d'Alene Railway is more entertaining; some of the railway lawyers called Boyd "an evil spirit," "a demon," "a spectre," "a nightmare," but he got his money (228 U.S. 482).

Chapter III deals with the proceedings leading to the ratification of a scheme of reorganization, and the law of 1933 is considered with its requirements of at least three creditors with a claim of at least $1,000 and good faith. Judge-made law receives due consideration and comment.

The personnel of reorganization next comes on for discussion—the judge granting the decree, the trustee, the claims of creditors, special masters, etc., their functions being well defined.

A chapter on the plan of reorganization follows—there is no standard mode of reorganization as yet established. That of the Woodward Iron Company in 1936 receives special attention. The position of ordinary creditors as distinguished from that of bondholders is dealt with at considerable length. It is wisely said, "It is impossible to please everybody,"—a plan of reorganization cannot furnish full satisfaction of the claims of all as they appear before the scheme—it must be a compromise in which everyone has a new position—the scale of priorities will change—here the work of Professor Bonbright of Columbia receives due recognition—he prefers the relative priority principle to that of absolute priority, and this seems to be the case with the judges of the Supreme Court.

In the chapter on accompanying problems, the author deals somewhat at length with expenses and salaries, and it is said that the decisions of Judges Coxe and Wilkerson in the Paramount and Middle-West Utilities case have established a series of principles which the courts have generally followed. We have the criticisms of the system with an inquiry into the merits of the propositions of reform.

Not the least interesting of the many interesting chapters is that of final considerations. The opinion of James M. Landis, Dean of the Harvard Law School, is quoted. He considers that the development of the right of administration constitutes a transformation of the ancient Anglo-Saxon juridical system, comparable to that in England when the requirements of commerce turned the merchants from the courts of common law and obliged them to have recourse to tribunals less bound by legal formulism. In the section headed "protection of savings" the saying is quoted, "There are no longer robbers, there are no longer anything but financiers,"—but the author does not give credit to this popular sarcasm.

An appendix is added, "A clinical study of one reorganization, The Baldwin Locomotive Works," taken, it is said, by chance among some 4,000 others. This contains a graphic account of the growth of the enterprise from its beginning in 1817 under Mathias Baldwin, organized as a partnership in 1839, and finally incorporated under the laws of Pennsylvania in 1911 under the name of "The Baldwin Locomotive Works, Inc." At that time it had control over several subsidiaries. Reorganization began in 1933, continued in 1934, the capital was reduced from $42,134,000 to $30,548,900; in 1935, the president urged the need for a change and an appeal was made to the court, followed by a completely new structure, in February, 1937.

This interesting book is printed on good paper with good type, and if the author makes an occasional typographical error it is in an English, not a French word. Had a complete index been added, the work would have been practically unexceptionable.

WILLIAM RENWICK RIDDELL

Osgoode Hall, Toronto

Marihuana: America's New Drug Problem. A Sociologic Question with Its Basic Explanation Dependent on Biologic and Medical Principles, by Rob-

ert P. Walton. 1938. Philadelphia: J. B. Lippincott Co. Pp. 223.—Professor Robert P. Walton, of the department of pharmacology of the University of Mississippi, has undertaken to assemble in this book the widely scattered material, both popular and scientific, concerning marihuana. The name is derived from an American Indian word meaning "intoxicant." This drug is obtained from the common hemp plant and as "hashish" has been known since ancient times. Its effect varies according to the psychogenic make up and affords a variety of emotional and physiologic reactions. The author quotes a number of introspective accounts, among the more interesting being that of the legally trained FitzHugh Ludlow in 1857.

Considerable divergence of opinion exists as to the relationship of the drug with crime. As early as 1923 a defense appeal in Texas was based on the fact that the convict was a user of marihuana; nevertheless the Court of Criminal Appeals affirmed his murder conviction. In 1936 a Louisiana narcotic officer stated that 60% of New Orleans crime was to be blamed on marihuana users. On the other hand Dr. Bromberg of the New York Court of General Sessions did not find a confirmed addict in 2,216 criminal cases. In his opinion the drug is less responsible as a crime provocative than is alcohol. He finds that marihuana is not the cause of criminal tendencies; rather is it these anti-social tendencies that are the cause of marihuana smoking. Walsh agrees that there is no specific property in hemp drugs inciting to violence or crime. Generally the drug is used by criminals to nerve themselves for deeds which they have already planned and for which they must be held culpable.

By the end of 1937 every state had passed some legislation dealing with marihuana, the results being summarized here in a table. Useful also are the excellent illustrations of the hemp plant. A bibliography of four hundred nineteen items serves as a guide to more detailed reading upon particular aspects of the problem. Professor Walton's book will be found especially valuable as an antidote to lurid newspaper and magazine articles.

JAMES A. HARGAN

New York City

Lord Macaulay, Victorian Liberal, by Richmond Croom Beatty. 1938. Norman: University of Oklahoma Press. Pp. xvi, 387.—In describing Macaulay as "Victorian Liberal" Professor Beatty (of the English department of Vanderbilt University) emphasizes a paradox worthy of that master of paradoxes who is his subject. For though as a young member of Parliament Macaulay made influential speeches in favor of the Reform Bill of 1832, toward the end of his career he predicted dire consequences to the United States for extending the suffrage to a rabble without property, and there can be no doubt that he would have viewed with horror the extension of democracy in his own country that came after his death. He was too sure of his own eternal rightness, and the wrongness of every one who held opposing views, to be truly liberal in any strict sense of that abused word. Professor Beatty seems fully aware of the paradox, however, and in his discussion avoids alike the recently too popular mania for "debunking" heroes of the past and undue partisanship.

This book does not pretend to supersede the admirable *Life and Letters of Lord Macaulay* published in 1876 by his nephew, George Otto Trevelyan. The new work is in the main a skillful condensation designed for readers who do not care for the full-length letters and journal extracts given by Trevelyan, plus an attempt to make clear in their contemporary setting the main ideas of Macaulay's principal speeches, essays, and other writings. In the latter respect, perhaps, the book most usefully supplements Trevelyan's; but there is other supplementary material, mainly from the Journals, which must still contain dynamite, since they may be examined in Trinity College Library, Cambridge, only by special permission of Macaulay's grandnephew, Professor George Macaulay Trevelyan. A good many passages which the elder Trevelyan omitted, usually for reasons perfectly obvious in 1876, are now quoted, especially in the chapter aptly called "Censor." Remarks about "that ass Carlyle," and characterizations of Landor as a "blustering humbug" or Wordsworth's *Prelude* as "a poorer Excursion," are conspicuous among many contemptuous comments on contemporaries which give further irony to the term "liberal."

But it is unfair to stress this point. Macaulay's prose writings, of their kind and for their purposes, remain and are here recognized as the admirable models of clarity and movement they have always been. A lawyer might wish for more specific discussion of the Indian Penal Code which was so remarkable an achievement for a man with practically no experience at the bar; but Mr. Beatty doubtless felt that in summarizing recent comments by natives he was giving the topic as much space as due proportion would permit.

The bibliographical note at the end omits mention of several works on Macaulay, and the book is not free from errors—mostly minor—in details; but on the whole it is well written, interesting, and unquestionably useful.

GEORGE L. MARSH

University of Chicago

Practice and Evidence Before the U. S. Board of Tax Appeals, by Charles D. Hamel. 1938. New York: Prentice-Hall, Inc. Pp. civ, 558. In reviewing the first edition of Mr. Hamel's book, (27 Col. L. Rev. 484) Roswell Magill, after voicing several criticisms added: "All these are matters which can readily be corrected in a second edition." That Mr. Hamel has more than met the critic's challenge will be acknowledged by all who have had occasion to use the new edition.

With a lucidity of style and language unusual in so exhaustive a work, Mr. Hamel covers the whole field of practice and procedure before the Board of which he was the first Chairman. Beginning with a thorough discussion of procedure in the Bureau of Internal Revenue, (thus meeting one of Professor Magill's objections), the author discusses in turn the jurisdiction of the Board, the pleadings, proceedings prior to the trial, (the calendar, settlements, depositions, etc.), the trial itself, proceedings after the trial, (amendments, the briefs, the decision, rehearings), and review by the courts. A chapter devoted to transferee liability concludes the first part of the book.

Part two concerns itself with evidence before the Board, with chapters devoted to presumptions, the "best evidence" rule, the hearsay rule, expert testimony, and proof of value. While the discussion and the citations are directed primarily at taxation cases, this section is recommended also for its general utility on questions of evidence, particularly in matters involving the federal courts. The field covered will prove of value not only to attorneys, but also to accountants.

Not the least useful of the book's features, is a ninety-seven page Table of Cases, covering the Federal Courts and B. T. A. reports. The Appendix includes the Board's Rules of Practice, a series of forms for use before the Board, facsimiles of typical form letters sent to the taxpayer by the Bureau of Internal Revenue, the section of the District of Columbia Code (annotated), pertaining to evidence, a collection of forms covering appeals to the Circuit Court of Appeals, and excerpts from the various acts of Congress applying to the Board.

So thorough, yet so simple and understandable, is the new edition that this reviewer can do naught but echo the language Professor Beale (40 Harvard Law Review, 336), applied to the first edition:

"The book is indispensable for all who practice before the Board or are interested in income tax appeals."

FRANK T. BOESEL.

Milwaukee.

Creation of Rights of Sovereignty through Symbolic Acts, 1400-1800, by Arthur S. Keller, Oliver J. Lissitzyn and Frederick J. Mann. 1938. New York: Columbia University Press. Pp. 182. This small volume represents a great deal of labor and research. It is, moreover, of considerable contemporary interest, and lawyers as well as students of history and international relations and affairs will find it both illuminating and suggestive.

The subject dealt with in a strictly scholarly way is the method employed by the leading maritime powers of Europe during the period covered—1700-1800—in acquiring dominion over *terra nullius:* that is, land not under any recognized sovereignty. The concept of sovereignty is of course modern, but the earlier and vaguer concept was understood to imply lordship or supreme rule over annexed or conquered territory, and perhaps the acceptance of the obligation to pay tribute.

It is significant to note that "the presence of a savage population, of aborigines, or of nomadic tribes engaged in hunting or fishing, was generally disregarded by the European." Agreements, or informal treaties, might or might not be negotiated with tribal chiefs, but such instruments were not deemed necessary to the acquisition of sovereignty. They were expedient and useful, however. Title was acquired by certain symbolic acts, more or less formal. For example, the erection of a cross, or other monument, bearing the royal arms of the nation seeking dominion was sufficient, as a rule. Some of the powers made the ceremony religious as well as secular.

The details varied, but the principle behind the ritual was the same. Mere discovery, in the sense of visual apprehension, was not enough, nor embarkation and exploration. On the other hand, acts expressive of occupation and possession were not considered essential.

The scope of the work may be indicated by the titles of its several chapters: Introduction; the Usage of the European powers with respect to native governments; Portuguese practice; Spanish practice; English practice; French practice; Dutch practice; Scandinavian and Russian practice; Conclusions.

The bibliography is striking. It gives one an idea of the sort of material the authors had to dig up, examine and analyze in order to form their fairly definite, if in some respects still tentative, opinions. Certainly their task, if difficult, was distinctly rewarding. They have rendered a real service to a branch of legal and historical literature that has been strangely neglected.

Television: A Struggle for Power, by Frank C. Waldron and Joseph Borkin. 1938. New York: William Morrow & Co. Pp. 300. What is television? Why is its progress so slow? What will it do, negatively and positively? What will be its effects on radio, on the movies, on the legitimate theatre? What social and cultural benefits does it promise—*if any*—and what threats does it carry?

These extremely interesting and significant questions, of which the general public is scarcely aware, but which, ere long, will challenge national and international attention, are discussed very ably and candidly, without undue prejudice, by the authors of the timely volume under notice. One of them is a trained journalist, the other a specialist and technical expert. Together, they have rendered a distinct service to popular education.

Television is in one sense merely "a trick"—the use of electrons in order to look at something not visible to the naked eye. But it also happens to be the most effective means yet developed of communicating information, reporting events as they take place, bringing dramatic and other spectacles into the home, and re-enforcing sound by appeals to the eye. Obviously, this powerful instrumentality can be seriously abused. The dishonest advertiser and the partisan political propagandist will seek to exploit it, and the dictator will strive to convert it into a tool for the control of opinion.

Statesmen and sincere leaders of civilized societies, therefore, cannot remain passive in a situation so full of dynamite. Can we trust private enterprise and the motive of corporate gain to solve the problems of television in the true interest of the public, or will it be found necessary to treat television as a public utility, and, if so, what methods of regulation and prevention are most likely to yield the desired results?

Already, it appears, there is a fierce struggle of giants for the control of television. This struggle will present many complex legal issues, which the highest court in the country will have to decide sooner or later. Lawyers will do well to familiarize themselves with these issues, even if they do not expect to take an active part in their eventual settlement.

In addition to the economic, social and intellectual aspects of their subject, the authors give the thoughtful reader much technical information about television, radio, and telegraphy. They refrain from drawing conclusions of a dogmatic kind. They will, however, enable some alert and progressive students of the television problem to take certain definite positions and defend them before congress and in the forum of disinterested public discussion.

VICTOR S. YARROS.

The Lewis Institute, Chicago.

Personal Income Taxation, by Henry C. Simons. 1938. Chicago: The University of Chicago Press. Pp. xi, 238.—The blurb on the paper jacket describes this book as "a systematic discussion of the broader practical problems of progressive taxation" and assures us that it is "For the interested layman as well as the special student." With regard to economics and political science the average lawyer is undoubtedly a layman, and from his point of view the present criticism proceeds.

The volume is uneven in several respects. It lacks severe unity and coherence. The chronology of au-

thorship seems to have been rather scattering. At one point in the introduction Mr. Simons states that certain paragraphs "were written years ago" when his views were somewhat different, but that complete revision "has not seemed necessary." One of these unrevised paragraphs contains this: "For the immediate future, however, the retirement of public debts will provide an adequate offset to the adverse effects of progression [of tax rates] on saving . . ."! As to rhetorical coherence, development of the author's thought is complicated by dangling footnotes, addenda at the ends of chapters, and considerable wandering in the text. One would expect the chapter "Summary and Statement of General Position" to end the book. It does not, being followed by a supplementary note of some length commenting upon the views of Professor Irving Fisher. Not only would the job have taken fewer pages with careful organization, but its impact would have been far more solid.

As to content, it is fair to recall the claim that the "broader practical problems of progressive taxation" form the subject of discussion. The early pages contain long stretches of theoretical economic material, with much quotation, comparison, and criticism of the works of American and foreign scholars. A great deal of this seems an excursion into fairyland—a fairyland which some lawyers will find at least as tedious as that which Gray attributed to Preston's lucubrations. To be sure, the author explicitly warns us away from many of these passages if we do not like this kind of thing. But the sense of impracticality carries beyond those areas staked with warning signs. Take, for example, a later chapter discussing "income in kind," which includes income derived from pressing one's own trousers or living in one's own house. Mr. Simons advocates inclusion in tax calculation of income in kind from the more durable forms of consumer capital, at least in the case of real property used for consumption purposes. He tells about the English practice and the Australian practice; he tells what Professor Canning maintains, what Roscher contends, what Schanz and B. Moll say about Roscher, and what he himself thinks about B. Moll; yet nowhere does he tell us what Mr. Justice Butler says for the Supreme Court of the United States in *Helvering v. Independent Life Insurance Co.*, 292 U. S. 371, 378-379 (1934), to wit: "If the statute lays taxes on the part of the building occupied by the owner or upon the rental value of that space, it cannot be sustained, for that would be to lay a direct tax requiring apportionment. . . The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment." Something, the lawyer will feel, is wrong with a sense of effective values which gives the voice of economic theory so much of a hearing, and the voice of constitutional doom no hearing at all.

On the other hand, there are chapters full of illumination and help for the practical-minded layman. The best and most important of these has to do with the treatment of gratuitous receipts, which the author would include in computation of the recipients' taxable income, with appropriate modification of the present Federal estate and gift taxes. The exposition of this thesis is worthy of serious legislative consideration. Indeed, throughout the volume are spread suggestions, explanations, and criticisms well calculated to stir useful thought. Mr. Simons writes with zest and apt turns of expression, his perception is acute and his reasoning dexterous, and the same ranging quality of intellect which works against unity has produced a book reasonably certain, in one part if not another, of appeal to any inquiring mind.

Harvard Law School JOHN M. MAGUIRE

Summaries of Articles in Current Legal Periodicals

BY KENNETH C. SEARS
Professor of Law, University of Chicago

ADMINISTRATIVE LAW

Public Service Commission Procedure—A Problem and A Suggestion, Ray A. Brown, 87 U. of Pennsylvania L. Rev. 139. (D. '38; Philadelphia, Pa.)

Atttention to the subject of the judicial review of administrative decisions is not so intensive as it was. Interest is turning toward the subject of administrative methods and this subject has not been thoroughly investigated. Professor Brown in his interesting and very valuable article considers the administrative methods of only one type of administrative commissions but apparently this is the way that the subject will become familiar. For instance, it appears reasonably clear that public service commissions must base their determinations only on evidence introduced at an open hearing. This is the judicial ideal but it is anomalous for a body with executive functions and may be highly inconvenient. After considering various aspects of this requirement such as (1) judicial notice by public service commissions, (2) use by a commission of its own records, (3) use by commissions of reports by its employees upon ex parte investigation, and (4) what constitutes competent, relevant, and probative evidence to sustain a commission's order, the author offers a proposal to make commission procedure adequate, yet free from the lost motion that is involved in the present restrictions. It is not offered as "a complete working model." The general idea is to avoid as much as possible the time-consuming job of taking testimony orally.

ADMINISTRATIVE LAW

Should Rules of Evidence Govern Fact-Finding Boards? Charles A. Riedl, 23 Marquette L. Rev. 13 (D. '38; Milwaukee, Wis.)

Our fact-finding boards violate the dogma of separation of powers and constitute a threat of arbitrary government. The vast majority of them do not observe the common law rules of evidence. This is the cause of considerable disquietude. "But while it is comparatively easy to see why it is desirable to prescribe rules of evidence for fact-finding boards, it is not at all an easy matter to say what rules should be

prescribed and for what boards." Their functions differ. "Our proposal is not to introduce the whole body of common law rules into administrative tribunals"....but "The testimony.... should have at least the basic legal guarantees of truth." More specifically, "Judicial or administrative notice can be taken if facts noted and their sources are incorporated in the record. The hearsay and best evidence rules may be modified to the extent that there is still a sufficient guarantee of the truth of the facts obtained thereby."

ADMINISTRATIVE LAW

The French System of Administrative Justice: A Model for America? Stefan Riesenfeld, 18 Boston U. L. Rev. 715. (N. '38; Boston, Mass.)

This extensive article in three parts is completed. Those interested in American administrative law should be interested in the following among other conclusions: (1) Knowledge of the French system recently displayed in this country is scanty and superficial; (2) the American system can be improved by considering the experience of other nations, but a wholesale borrowing of the French system "could not and should not be done"; (3) the French experience favors a central court of expert judges dealing exclusively with administrative review; (4) issues "of especially technical character are best decided by special administrative tribunals" and over them the central administrative court "needs to exercise only a limited amount of judicial control"; and (5) care must be exercised to eliminate jurisdictional controversies between administrative and judicial courts.

ADMINISTRATIVE LAW

The Logan Bill, Gregory Hankin, 27 Kentucky L. Jour. 3. (N. '38; Lexington, Ky.)

The committee on administrative law of the American Bar Association has been sponsoring a bill, which it is hoped will solve some of the complaints concerning the functioning of our national administrative agencies and tribunals. The Logan Bill, presumably not in its final form, is a different proposal which would establish a United States Court of Appeals for Administration. Though the bills conflict in some provisions, to a considerable extent they could be made to supplement each other. Why not work the two bills into one harmonious scheme and then join forces to test the views of those in Congress? In any event, the instant discussion of the Logan Bill is very interesting and easy to read. The author is a proponent of the bill. Besides an explanation of its provisions the reader will obtain a good view, simply expressed, of such subjects as the present status of the review of administrative action, the reviewing courts and the sort of orders that are subject to review, the scope of judicial review, and the enforcement of administrative orders. In addition there are three exhibits presenting diagrams which illustrate (1) the present system, if it may be called such, of statutory judicial review of administrative orders, (2) the present method of enforcement, and (3) the proposed Logan Bill plan for the review of the orders and decisions of sixteen important national boards, commissions, and authorities. Altogether, Mr. Hankin has presented a capital article on an important problem. "The great immediate advantage of this measure, with reference to the enumerated administrative agencies, lies in the fact that their orders will be reviewed by one court, rather than by approximately 100 courts."

CIVIL SERVICE

The "Right" of An Employe of The United States Against Arbitrary Discharge, Howard C. Westwood, 7 The George Washington L. Rev. 212. (D. '38; Washington, D. C.)

The national government has been concerned about the unfair labor practices of private employers but it has not carefully protected its own employees from unjustifiable discharges. Perhaps, we can not be sure that there are many of such cases. The merits of the complaints are not being tested in court. While in 1912, there was enacted a statute that expressed the civil service rule, for the protection of the employees, that had been in existence since 1897, still court interpretation has left it without sanctions. So, we have only the morality that to remove a classified civil service employee, he must be given a written statement of the reasons and an opportunity to answer in writing, and to present affidavits. Removal is limited to the promotion of the efficiency of the service. But the court made law is that an improper removal cannot be corrected by mandamus, or a suit for salary, or by an equitable procedure. In addition, it has been suggested in opinions of the Attorney-General that the President by regulation can remove employees from the competitive class and place them in the excepted class where their future service would be dependent on the pleasure of the appointing officer. Therefore, now appears to be the time for all good citizens interested in the national civil service to come to the aid of public employees, because "as matters now stand the individual employee is helpless."

CONSTITUTIONAL LAW

The "Conspiracy Theory" of the Fourteenth Amendment: 2, Howard Jay Graham, 48 Yale L. Jour. 171. (D. '38; New Haven, Conn.)

This final instalment of an article published earlier in 1938 considers the development of the idea that corporations were entitled to *substantive* due process and then whether the Joint Committee which drafted the Fourteenth Amendment "could have" regarded corporations as within the terms of section one of the amendment. After tracing court development before 1866 of the use of due process in the substantive sense, disclosure is made of the activity of insurance and railroad interests that were presenting petitions to Congress while the Joint Committee was at work. They sought congressional protection against certain state legislation adverse to these interests. From the evidence presented the author sets forth four major possibilities "any one of which lends support to the view that the constitutional status of corporations probably was considered by the framers". But these "leave a doubter with his doubts". Mr. Graham's tentative conclusion is "that the corporation problem probably did come up incidentally in the discussions, and that no special significance was at that time attached to it one way or the other". He "feels confident that section one (of the amendment) was not *designed* to aid corporations nor was the distinction between 'citizens' and 'persons' conceived for their benefit". Still more important is the author's "outstanding conclusion" that the expansion of the substantive due process doctrine was assured "whatever may have been the original objectives of the framers".

CONSTITUTIONAL LAW

Legal Aspects of Executive Agreements, William Hays Simpson, 24 Iowa L. Rev. 67. ('38; Iowa City, Ia.)

Mysterious is the law that controls or is supposed to control the agreements between the United States and foreign nations. Perhaps if two-thirds of the Senate, that is required to ratify a *treaty*, had not been what it has been in our history, we would not be making distinctions as to executive agreements or arrangements. This discussion is no attempt to analyze and elucidate fully this difficult problem but it is interesting reading that sets forth some of our experience, which is likely to be of more importance in this field than an exercise of the philosopher's art. The author's question is: "Who may make compacts not having the dignity of treaties?" The answer is not complete as to who "may", but we are given considerable information as to who have made them. (1) The President has made them under grants of power from Congress: (a) postal agreements and (b) tariff arrangements. (2) ". . . it is not unreasonable that a somewhat similar power could be conferred by treaties", but there appears to be very little precedent for this. (3) Presidents have asserted the right to make and have made executive accords under general constitutional doctrine. Thus, it is concluded "that the President can execute accords concerning any international question in which he does not make commitments that are contrary to the Constitution, laws or treaties of the United States."

CONSTITUTIONAL LAW

A Child Labor Amendment Is Unnecessary, James Barclay Smith, 27 California L. Rev. 15. (N. '38; Berkeley, Calif.)

Why is a child labor amendment unnecessary? Because Congress can amend the Social Security Act, which has been approved, by placing a prohibitive tax upon the employment of labor of persons under a specified age. This, thinks the author, will go along to approval as a legitimate exertion of the taxing power and not be condemned as a penalty that is not a true tax. Perhaps so. Who can say with assurance that such a program will fail? Hardly those who believe that the distinctions that have been drawn in the Supreme Court as to taxes and penalties are a jumble that cannot be satisfactorily reconciled. Mr. Smith apparently is not of this crowd. He believes in Hammer v. Dagenhart but he thinks of a broad doctrine rather than the specific thing forbidden under the statute that was held invalid. He also seems to believe that the Supreme court has kept its rulings on the permissive use of taxes at least reasonably clear. What is customarily called the Child Labor Tax Case "was not a tax case at all". Congress thus has the power to limit and prohibit child labor by taxation. May Congress use the taxing device in order to "regulate" child labor? The author apparently would say no. Shall we now have an amendment to the constitution that will forbid congress to enact a law that will prohibit child labor by taxation or otherwise? Is this the logic of the failure of three-fourths of the states to ratify the pending (?) Child Labor Amendment?

LIBEL

The Legal and Journalistic Significance of the Trial of John Peter Zenger, Ralph L. Crosman, 10 Rocky Mountain L. Rev. 258. (Je. '38; Boulder, Colo.)

A brief, interesting account of a famous old trial comes from the pen of a journalist. Two defenses offered the basis for important developments in the law of criminal libel: (1) truth as a justification and (2) the jury as a judge of both the law and the facts. It does not appear entirely correct to assert that the case went to the jury "without evidence being presented on either side". Counsel for the accused confessed publication but asserted a right to publish the truth. The court refused to admit evidence of the truth even though the defendant offered to go forward. That in brief was the law suit. It is interesting to read that defendant's counsel told the jurors that he must appeal to them "for witnesses to the truth" and that they "are supposed to have the best knowledge of the fact" . . . Yes, this trial occurred in New York in 1735. The court instructed that in view of the confession the only question was whether the language was libelous, "a matter of law . . . which you may leave to the court". But the jury reflected the community sentiment and said "not guilty".

Recent Supreme Court Decisions

(*Continued from page 237*)

the postponent was merely a recognition of the injunction and since in any event the commissions finding of illegality was specifically left in effect.

The case was argued on January 3rd and 4th, 1939, by Mr. John S. Burchmore for appellants and by Mr. Edward Mr. Reidy for appellees.

Railroads—Unlawful Rate Rebates—Elkins Act Indictments—Venue

United States v. Midstate Horticultural Co. et al; United States v. Pennsylvania Railroad Co. 83 Adv. Op. 410; 59 Sup. Ct. Rep. 412. [Nos. 286, 287, decided January 30, 1939.]

Appeals to determine whether an indictment against a Railroad and shipper for unlawful rebates on interstate shipments, in violation of the Elkins Act (U. S. C., Title 49, § 41 (1)) and which was brought in Pennsylvania, one of the districts through which the shipment passed on its way from California to New York, charges an offense committed in that district so as to be properly prosecuted there under Article 3, § 2, cl. 3, and Amendment VI of the Constitution. The indictment showed that when the shipment was made, the lawful tariff was paid, that the rebates were paid in New York three years later, and that prior to payment of the rebates, there was no intention or agreement to make unlawful concessions.

The Court's opinion by MR. JUSTICE BLACK denies a motion to dismiss the appeals. It also concludes that, despite the subsequent rebates which might be unlawful, and contention of the government that the district court in Pennsylvania had jurisdiction of the offense by virtue of the transportation through Pennsylvania, should be rejected. When that transportation occurred, it was at a lawful rate and without intent to commit a crime and, therefore, no violation of the Elkins Act was begun, committed, or brought about in Pennsylvania within the meaning of that Act. Dismissal of the indictments by the Pennsylvania district court was therefore affirmed.

The appeals were argued on January 13, 1939, by Mr. Wendell Berge for the United States and by Mr. Francis Biddle for the Pennsylvania Railroad Company and by Mr. Henry Silverman and Mr. Samuel L. Einhorn for Midstate Horticultural Company, Inc.

THE FEDERAL POWER OVER INTERSTATE COMMERCE TODAY

Sharp Line between Federal and State Powers Drawn in *Adair vs. United States* and Earlier Cases—Unsuccessful Attempt to Utilize Different Theory in *Hammer vs. Dagenhart*—Decisions in Cases Involving National Labor Relations Act Reveal a New or Changed Attitude of the Court as to What May Rightly Be Regarded as Directly Affecting Interstate Commerce—Wage and Hour Law—Reasonably Clear That Temper of Court as to Bearing of Various Labor Practices upon Flow of Interstate Commerce Is More Likely to Be Favorable to Exercise of Federal Power*

By Arthur A. Ballantine
Member of the New York Bar

THE Labor Relations Act and the Fair Labor Standards Act are federal laws intimately affecting the conduct of most business enterprises of any size. They relate not to taxation or to sales in interstate commerce, both familiar subjects, but to the day to day operation of factory, mine and warehouse. Seven or eight years ago practices in production were thought to be beyond the federal power, and exclusively within the control of the States. What is the legal foundation of these new extensions of federal authority, and what further structure will that basis support? That is a question of constitutional law, but it is today a most practical question of business management.

The Federal Government, of course, remains a government of limited or enumerated powers, created by the Constitution, and there has been no new grant of power to that government. The grant of authority over interstate commerce on which these new statutes mainly rest is derived from the Commerce Clause, Section 8 of Article 1, which says that "The Congress shall have power . . . to regulate Commerce with foreign nations, and among the several States, . . ."

That clause represents one of the fundamental bases of the constitutional compact—the idea of giving the necessary independent authority to the central government over common affairs, while reserving to the separate States authority over local or internal affairs. That idea was reinforced by the provisions of the Tenth Amendment, expressly stating that all powers not granted to the Federal Government were reserved to the States, or to the people thereof. Decision as to whether, or to what extent, any act of Congress goes beyond the scope of the constitutional power of Congress to regulate interstate commerce rests ultimately with the Supreme Court. Recent decisions of that Court in effect give this power broader practical application than it had in the past. Under present conditions the tendency of those decisions is likely to carry on.

Until rather recently there was a well-settled idea as to the limits of the federal authority over commerce. Commerce was taken to mean trade, transportation, transmission or communication among the several states, sharply contrasting with production within the States, whether by mining, growing or manufacture. The Supreme Court, speaking 50 years ago, could well declare

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form [sic] for use. The functions of commerce are different."

The Court declared:

> "Commerce succeeds to manufacture, and is not part of it,"

and the Court rejected the idea that if articles being produced were intended for sale in interstate commerce that consideration furnished the basis for the exercise of federal power over practices in production.

Under this view, established for many years, regulations which Congress could impose on interstate commerce were those which related to actual physical movement or direct impairment of the flow of interstate commerce, and to the character of the goods forming the subject of commerce. There were developed the Interstate Commerce Act, governing rail and water transportation, the Sherman Act prohibiting contracts or combinations in restraint of interstate commerce, the Federal Trade Commission Act relating to practices and methods in interstate sales. Acts regulating the stockyards at Chicago were supported on the ground that those yards were adjuncts of interstate commerce —that the activities in the stockyards constituted part of the flow of interstate commerce. The Court also sustained those acts that banned from commerce goods believed to be intrinsically harmful, such as lottery tickets, impure food and drugs, and, finally, intoxicating liquor if moving into a prohibition state.

When it came to practices not relating to the actual movement of goods or dealing with the inherent character of the goods, the Court drew a sharp line between the Federal power and the State power. Thus, in *Adair vs. the United States*, decided in 1908, the Court declared invalid a federal statute which forbade interstate carriers to make so-called "yellow dog" contracts with their employees against joining labor unions. The Court said:

"Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency

*Address delivered at Annual Conference of the American Management Association in New York City on Jan. 26, 1939.

of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employe's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employe is connected by his labor and services."

This general conception was adopted in decisions relating to the actual effect of strikes on interstate commerce. In the Coronado Coal Company cases against the United Mine Workers, it was urged that activities of the union in conducting a strike that shut off the production of coal moving in part into interstate commerce was a violation of the Sherman Act. The Court held that such activities were not within the prohibition of the Act, unless a showing was made that the activities were actually intended to restrain interstate commerce, or had such a direct effect that such an intent might be inferred. The Court adhered to the idea that any practice sought to be regulated by Congress under the interstate commerce power must have a direct and immediate effect upon such commerce, and found it difficult to recognize such effects unless actually intended.

An unsuccessful attempt was made upon a different theory to utilize the Commerce Clause to accomplish effects upon production. In 1916 Congress passed an act providing that no producer, manufacturer or dealer could ship in interstate commerce any article produced from establishments where children under specified minimum wages had been employed. The Court in *Hammer v. Dagenhart*, a 5 to 4 decision, held this statute invalid, stating that, in effect, it did not regulate transportation but sought to standardize the ages at which children could be employed in the different States, a matter resting within the power of the States themselves. The Court declared:

". . . the production of articles, intended for interstate commerce, is a matter of local regulation.

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture."

With that view Justice Holmes, and three of the Associate Justices, strongly disagreed. In his famous dissenting opinion Justice Holmes said:

"The Act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. * * * Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States."

This view would, in effect, greatly enlarge the federal power at the expense of the States. So far it has not prevailed with a majority of the Court. The Court has sustained the right of Congress to make it an offense to ship intoxicating liquor to a State in which importation was prohibited, or even the sale was prohibited, and more recently has sustained the right of Congress to prohibit shipment into a State of goods made by convict labor, where the sale of such goods in the State was in violation of its laws. In that very decision, however, the Court did not overrule but distinguished its holding in the child labor case. It is not to be forgotten, however, that Justice Holmes' doctrine that Congress may use its power over the actual interstate movement of goods to enforce any policy it may see fit to adopt, is available for possible adoption by a majority of the Court.

Economic distress resulting from the great depression led to the formulating of great extensions of Federal regulation based on the Commerce Clause. A constitutional philosophy for such extension lay at hand. It has been well said:

"* * * The position was taken in the executive and legislative departments of the government that the nation had come to a new conception of commerce; that business had outgrown the States and had become a matter of national concern, and that our purely internal political, economic and social life was so intimately connected with our national commerce that it had been finally swallowed up in the latter's dominance."

However, early New Deal statutes, passed on the basis of such a view, failed to accord with the Court's view as to the limits of federal power over interstate commerce. In the celebrated *Schechter* case, *Schechter Poultry Corp. vs. United States*, 295 U. S. 495, decided in 1935, Title I of the National Industrial Recovery Act, providing for industrial codes, was held unconstitutional. One of the grounds of the decision was that the act provided for unwarranted delegation of legislative authority, but the other ground was that the code adopted by the industry regulating, among other things, the wages and hours of labor, was outside the scope of the Commerce Clause.

The industry involved in that decision was the live poultry industry in the New York Metropolitan area. The fact that 96% of the poultry came to New York from other States, and the fact that wages and hours in the New York area affected the price structure in other States, were held insufficient to bring wages and hours in this industry within the scope of federal regulation. This decision was a unanimous one, Mr. Justice Cardozo and Mr. Justice Stone concurring in a separate opinion, in which Mr. Justice Cardozo said:

"I find no authority in that grant for the regulation of wages and hours of labor in the intrastate transactions that make up the defendants' business. As to this feature of the case, little can be added to the opinion of the court. There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. . . . Activities local in their immediacy do not become interstate and national because of distant repercussions."

Next came the *Carter* case in 1936 *Carter vs. Carter Coal Co.*, 298 U. S. 238 in which the Bituminous Coal Conservation Act of 1935, popularly known as the Guffey Act, was held unconstitutional. That act, which was framed on the theory that practices in the production of bituminous coal affected interstate commerce, provided for the establishment of maximum and minimum prices and for the adoption of codes fixing minimum wages and maximum hours for workers in the soft coal industry. In holding that the labor provisions of a code were outside of the scope of the Commerce Clause, the Court said:

"Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor, and working conditions, the bargaining in respect of those things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer and employe, which in all producing occupations is purely local in character. . . . The

local character of mining, of manufacturing, and of crop growing is a fact, and remains a fact, whatever may be done with the products."

It is not surprising that after the decision in the *Schechter* case it seemed to many lawyers that the old line of distinction followed by the Court would be adhered to and that a new view would not prevail. The National Lawyers Committee of the American Liberty League were very confident that the National Labor Relations Act would not be sustained. They declared:

"A business is by its very nature either intrastate or interstate in character and its essential character will prevail. We cannot change the nature of a business by legislative declaration or interpretation any more than we can, by legislative fiat, convert a regulation of labor into a regulation of interstate commerce."

Yet what could change was the view of the Court as to what practices indirectly affect interstate commerce, and therefore fall within the scope of Congressional regulation.

The National Labor Relations Act, passed in July, 1935, for the purpose of preventing obstruction of the free flow of commerce, declared that employees have the right of collective bargaining through representatives of their own choosing; stated that interference with that right is an "unfair labor practice"; and set up a National Labor Relations Board to prevent unfair labor practices affecting interstate commerce.

In April, 1937, the Supreme Court sustained the constitutionality of that act in a group of decisions which revealed a new or changed attitude of the Court as to what may rightly be regarded as directly affecting interstate commerce. In passing upon the application of that act to the enterprises in question, the Court took the view that the stoppage of production by industrial strife would have an immediate and direct effect on interstate commerce; that failure to provide for and safeguard the right of collective bargaining might promote strikes; and hence that Congress was warranted in adopting regulations designed to protect such bargaining in the interest of industrial peace.

In the decisions upon this act, the Court took the view that the authority of Congress to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed an essential part of the "flow of such commerce," and that while activities may be intrastate in character, when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential properly to protect that commerce from burdens or obstructions, Congress has power to control. At the same time the Court declared:

"The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State."

The Court further declared:

"Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

The decisions of the Court sustained the application of the act, not only to a great steel company, but also to a considerably smaller trailer factory, and, most striking of all, its application also to a relatively small Richmond clothing factory whose manufacturing operations were all conducted at its one small plant in Virginia, although it obtained its raw material, it is true, from other States, and sold its finished product largely in other States.

A later decision, *Santa Cruz Fruit Packing Co. vs. N. L. R. B.*, 303 U. S. 453, decided in March, 1938, sustained the application of the Act to a fruit packing company in California which employed between 1200 and 1500 persons during the peak season, derived *all* of its raw materials from within the State of California, and shipped outside less than half its product.

In the *Consolidated Edison* case, decided in December, 1938, the Court held that an electric power company operating in New York was subject to the National Labor Relations Act, although none of the power produced by the company was sold outside the State or for resale outside the State. The ground of the decision was that various customers depending entirely upon the Company for their supply of power were engaged in carrying on admittedly interstate business, such customers including interstate railroads, steamship companies, telegraph companies and radio companies. Because stoppage of the operations of the Company would result in obstructing the interstate commerce of such customers, the Court held that the effect on interstate commerce of the relations of the Company to its employees was direct.

The fact that the Labor Board cases decided in April, 1937, marked a decided shift in the views of the United States Supreme Court on the scope of the Commerce Clause is indicated by the fact that in all three of the cases the Circuit Court of Appeals had decided that the National Labor Relations Act was invalid, relying upon the *Schechter* and *Carter* decisions. During the interval between the Schechter and the Labor Relations Board cases, at least one additional Circuit Court of Appeals, and a number of District Courts, had made similar decisions.

From the first Labor Board decisions Mr. Justice McReynolds vigorously dissented, being supported in that dissent by the other Justices, VanDevanter, Sutherland and Butler. This dissenting opinion takes the view that the Court was in effect overruling its decisions in the *Schechter* and *Carter* cases, and was in effect obliterating the line between intrastate and interstate commerce. Mr. Justice McReynolds declared:

"There is no ground on which reasonably to hold that refusal by a manufacturer, whose raw materials come from States other than that of his factory and whose products are regularly carried to other States, to bargain collectively with employees in his manufacturing plant, directly affects interstate commerce."

The decision of the Supreme Court in the Labor Board cases does not abandon the doctrine that local activities cannot be regulated by Congress unless their effect on interstate commerce is direct or immediate rather than indirect or remote, but certainly the attitude of the Court as to what is a direct effect, and what is an indirect effect shows radical change. Certainly the view expressed in this opinion absolutely contrasts with that expressed by the Court in the *Adair* case. The Court lays down no precise test by which to judge the effect of a local practice, stating that the question is one of degree.

It is not entirely clear whether the decisions of the Court on the National Labor Relations Act indicate that the Wage and Hour Law will be sustained. The Wage and Hour Law, unlike the National Labor Relations Act, is not restricted to labor practices "affecting commerce." Instead the Act (a) forbids violations of the wage and hour standards as to any employee engaged in commerce or in the production of goods in

commerce, and (b) forbids interstate shipment of any goods produced in violation of these standards or produced in a child labor establishment. The latter prohibition raises the problem presented in the Child Labor case—*Hammer v. Dagenhart*—whether Congress can prohibit interstate shipment in order to achieve a collateral purpose that may be described as of a local character.

The prohibition of the violation of wage and hour standards presents the question as to whether the payment of low wages and the maintenance of long hours are to be regarded as imposing burdens on interstate commerce sufficiently "direct" to justify federal regulation of the wage and hour terms of employment. In the cases sustaining the jurisdiction of the National Labor Relations Board, the Court has pointed out that the businesses involved were sufficiently large so that a stoppage of their operation by a strike would reduce substantially the flow of interstate goods, but the Wage and Hour Law, by its terms, applies to all employees engaged in the production of goods for interstate commerce, even in plants so small that a strike in them would produce an infinitesimal effect upon the flow of goods. It would apply, for example, to a handful of employees of a New York maker of cane-bottom chairs, who happened to ship a half dozen chairs yearly over into New Jersey. Such a situation is different from any so far decided under the National Labor Relations Act.

It may also be argued that low wages and long hours do not create so high a probability of strikes, and thus of obstruction of interstate commerce, as do the practices condemned by the Labor Relations Act. Some of the decisions, particularly the Supreme Court case upholding the Railway Labor Act, indicate that interference with collective bargaining is a prime breeder of strikes.

As a practical matter, it is reasonably clear that the temper of the Court as to the bearing of various labor practices upon the flow of interstate commerce is more likely to be favorable than otherwise to the exercise of federal power. While the Court has not yet taken the view that all commerce between or within the States is merged into one, it has shown increased willingness to recognize an intimate relation between the two, and such attitude is likely to continue. Justices who have taken a conservative or classical view as to what is a "direct" effect have now been replaced by other justices more likely to extend than to restrict the view expressed by the Court in the decisions on the National Labor Relations Act.

The statutory distinction between State functions and Federal functions must depend in a very large measure upon the action of Congress rather than upon the action of the Court. Congress indicated recognition of that by excluding from the scope of the Wage and Hour Law establishments which are predominantly retail.

For a company which must necessarily operate in many States there may be distinct advantage in the uniformity of regulation resulting from Federal rather than State action. Even for a business operating only or primarily in one State it may be advantageous to have federal regulation in certain cases to equalize competitive conditions. There may also be other situations in which the widening of the scope of federal regulatory power will, although perhaps inconvenient at the moment, ultimately be recognized as beneficial. In the coming days business men and legislators alike must think out what is really desirable rather than count upon enforcement of the limitation of the federal power through court action.

Legal Education Council Plans Extension of Legal Institute Work Into Smaller Communities

THE meeting of the Legal Education Council in Chicago on January 8th was largely devoted to a discussion of plans for expanding the work of the Association on advanced legal education and particularly in planning to bring legal institutes to the smaller communities in the United States.

A resolution was passed by the House of Delegates at Cleveland recommending the setting up of courses for practicing lawyers on the subject of the new Federal rules "to the end that every lawyer in the United States shall have the opportunity, if he so desires, to attend such lectures."

The Association further called the attention of all Bar Associations to the program of Legal Institutes being fostered by the Legal Education Section and recommended a careful study of their possibilities. The fact that these recommendations are being followed in many places is indicated by the report made by the Section's Committee on Advanced Legal Education headed by W. E. Stanley of Wichita, Kansas.

The total number of lawyers who have gone to school at the Cleveland institutes held during the American Bar Association's sessions last summer, and at the institutes which have been held over the country since that time, amounts to somewhere between twelve to fifteen thousand, which is far in excess of anything of like character which has happened before. The result is that institute programs have been thoroughly demonstrated and the movement has been given a remarkable impetus and start.

Some of the attendance figures with the subjects lectured on have been reported as follows:

	Attendance
Cleveland—(A. B. A.) Federal Rules	500
Cleveland—Leach on the Drafting of Wills and Trusts	700
Washington (A. B. A.) Federal Rules	1000
New York— Association of the Bar and New York County Lawyers'—Federal Rules	800-1200
Atlanta—Federal Rules	633
Pittsburgh—Federal Rules	633
St. Louis—Federal Rules	750
St. Louis—Lashly and Gleick on Chandler Bankruptcy Act	...
Dallas—Federal Rules	500
Omaha—Federal Rules	500
Omaha—Barton Leach on the Drafting of Wills and Trusts	250
Birmingham—Federal Rules	350
San Antonio—Federal Rules	300
Louisville—Federal Rules	250-300
Dayton—Federal Rules	150-200
Seattle—Federal Rules	400
Detroit—Federal Rules	250-300
Detroit—Gerdes, Weinstein and Adams on Chandler Act	200
University of Tennessee—Federal Rules & Improvement of Procedure	250
Cincinnati—Federal Rules & Improvement of Procedure	250
Toledo—Federal Rules	250
Nashville—Chandler and King on the Chandler Act	...
New Orleans—Federal Rules	617
Indianapolis—Richard R. B. Powell on Real Property	150
Cleveland—Dean Goodrich on Conflict of Laws	600

Gainesville—Florida State Bar Association—
Federal Rules 300-400
Chicago—Five Lectures on Federal Rules...250 and up
Milwaukee—Five Lectures on Bankruptcy..... ...
Portland, Oregon—Federal Rules..... ...
Hershey, Pa.—Pa. State Bar Assn. January 6 and
7—Federal Rules ....
Durham, N. C.—Duke University, Administrative
Practice and Procedure—Stephens, Fahy,
Magill, Fetcher ....
Jersey City—Leach on the Drafting of Wills and
Trusts 700

Future institutes planned for this spring include lectures by Goodrich at Cincinnati, and Leach at Toledo on subjects listed above and Dean Bates of Michigan at Des Moines on Constitutional Law, Stason on Administrative Practice and Procedure at Cleveland, and an institute at Newark on the Federal Rules.

A plan is also being given consideration as to whether the cost of the larger city institute could be decreased somewhat and thereby increase the availability of the institute idea to localities with somewhat smaller population by establishing circuits and permitting a single speaker to visit a number of cities without loss of time between discussions. This would, of course, bring the speaker before the local bar for one evening or afternoon only but it certainly would offer the opportunity of bringing outstanding speakers before the local organization often and with less expense.

Mr. Burt J. Thompson of Iowa who was President of the Iowa Bar Association last year is Chairman of the Section's Committee on Organization and Development of the Institute work. He reported that in dealing with the smaller communities the work had to be organized and headed up on a smaller unit basis and that the Iowa experience indicated that the state basis was practical.

It was also felt that if bar associations, State and local, could be made to see and feel that they must have something to offer the lawyers, must have something definite to draw the lawyers to them, and that the best and most effective medium was through the program of advanced legal education, the development would be successfully carried on. Accordingly contact was made with every State and local bar association in the country and replies have indicated great interest.

At the two meetings of bar association executives called by the Chairman of the Section of Bar Organization Activities, one in Kansas City on November 13 and one in Columbus on December 11, plans for giving legal institutes in the smaller communities through the medium of the State bar association were presented and enthusiastically received.

The following conclusions were reached as a result of this report:

"1. The activity is one which must essentially be carried on in any state or city or county by localized groups.

"2. In the larger institutes the American Bar Association's Committee can furnish assistance and help through the selection of outstanding lecturers and arranging of rates of compensation and time schedules.

"3. In the smaller communities the lecturer must come from a short distance, the compensation must be small or its work must be done voluntarily. These must necessarily be selected, as the Committee views it, by an organization whose activities are directed to the same end as this committee, working as a part of the State bar organization.

"4. The idea must be sold to the various communities as an essential bar activity which will offer the lawyers something which they need, something which will benefit them in their practice and which will draw them into closer contact with the bar organization.

"5. Most of these local groups need some form of assistance in working out the plan and this can only be afforded by group meetings such as were held at Kansas City and Columbus and which should be arranged to be held throughout the country.

"6. It is essential that some man representing the American Bar Association should be able to be present and available to assist in this work.

"7. An advanced legal education Committee should be set up as a regular committee of every State Bar organization which should develop the ideas that apply to its particular State and particular localities within the State, calling upon the American Bar Association for such assistance as it may be able to give to implement the activities."

The Council agreed with the Committee that ultimate implications of the institute program are far greater than simply extension of information on legal subjects. It has the possibilities of giving a tremendous impetus to a better organization of and a larger participation in the work of local, State and national bar associations, because it will reach down to the "grass roots."

It was the firm conviction of the Committee, concurred in by the Council, that the plans for forwarding advanced legal education constituted the most effective activity that has been devised up to this time to strengthen and broaden the Association and its influence.

Two Law Schools Added to Approved List

The Council recommended the addition to the list of approved law schools of the University of Toledo Law School and of the Ohio Northern University Law School at Ada, Ohio, and accordingly these institutions were given provisional approval by the House of Delegates on January 10. Likewise the University of Kansas City Law School and the University of Buffalo Law School, previously provisionally approved, were given full approval by the House upon the recommendation of the Council.

In connection with the full approval given to the University of Kansas City School of Law, the Council passed the following resolution:

"It is hereby resolved that the University of Kansas City School of Law be recommended to the House of Delegates for full approval.

"It is further resolved that the Council hereby especially commends Dean Edward D. Ellison and Judge Elmer N. Powell for their services to the cause of legal education in the work they have done in the Kansas City School of Law, in raising standards for admission to the bar in the State of Missouri, and in bringing the law school up to the present high standards of full compliance with every requirement of the American Bar Association and the Association of American Law Schools. The Council congratulates Dean Ellison and Judge Powell on their long and valuable services in the law school and felicitates the school on having had the guidance for so many years of men who have shown themselves ready to give their full support to the highest modern standards of legal education."

JUNIOR BAR NOTES

By Joseph Harrison
Secretary of the Junior Bar Conference

THE Handbook for Directors and Speakers in its Public Information Program has been distributed by the Junior Bar Conference of the American Bar Association to the State and local directors of the program. The handbook, designed to be a guide to local directors in effectuating the Public Information Program in the States, counties and municipalities, was prepared by Milford Springer, Washington, D. C., National Director of the Program and Paul F. Hannah, Washington, D. C., Vice-Chairman of the Junior Bar Conference. It contains detailed instructions to State and local directors on methods and means to be used to arrange for speakers bureaus, speaking engagements, and radio programs on topics concerning the Administration of Justice, the American form of government and American citizenship.

In addition to such helpful suggestions as to the mechanics of the program, the handbook contains carefully studied speech material on nine subjects with bibliographies and source references. All State units of the Public Information Program are now equipped with material on the following subjects:

The American System of Government; The Constitution of the United States; Duty of Citizens to serve on Juries; Legal Aid Work in the United States; Modern Penology; Privilege of Voting; Relation of a Citizen to His Government; The Supreme Court of the United States; Youth at the Crossroads.

These subjects are part of thirty-four topics included in the Public Information Program and upon which similar research is to be made.

In carrying forward its Public Information Program, the Junior Bar Conference is working in close cooperation with the American Citizenship Committee of the American Bar Association of which Ralph R. Quillian, Atlanta, Georgia, is Chairman. Bar Associations, lawyers and lay groups interested in participating in this program or in having addresses made on these subjects may communicate with local Junior Bar Conference officers or with the Chicago office of the American Bar Association.

To date there are approximately 300 directors supervising 1500 speakers in 35 States, the District of Columbia and Puerto Rico. Many local radio series are in progress with noteworthy public response. Mr. Springer predicts that "we shall surely set a record this year for improvement of the bar's public relations through the means of our Public Information Program."

Sub-Committee on Small Litigants

Paul F. Hannah, Washington, D. C., Vice-Chairman of the Junior Bar Conference and Chairman of its Activities Committee has announced the appointment of the following to a sub-committee on Small Litigants: Robert E. Russell, Topeka, Kansas, Chairman; Thomas B. Curtis, 500 Security Building, St. Louis, Mo.; Irvine Porter, Comer Building, Birmingham, Alabama; Henry Bane, 111 Corcoran Street, Durham, North Carolina.

The object of the committee is to make a survey of small claims, justice of the peace and other lower courts affecting small litigants for the purpose of determining what improvements can and should be made in the system, or what further study should be made for the purpose of working out improvements. The subcommittee is to report at the Annual Meeting of the Junior Bar Conference at San Francisco.

Junior Bar Conference Notes

The Vermont unit of the Junior Bar Conference held a Round Table Conference at County Court Building, Montpelier, Vermont, on the morning of February 18, 1939. Chief Justice Moulton of the Vermont Supreme Court commended the Junior Bar upon its activities, particularly in promoting the Public Information Program. Discussions were held on such particular subjects as "Vermont Income Tax," "Vermont Pleading," and "The Appeal." W. E. Kidd, Neil D. Callson, and Walter S. Fenton, of the Vermont Bar, led the Round Table discussions on these subjects. The meeting was arranged by State Chairman, Osmer C. Fitts, Ludlow, Vermont, and Edward J. Shea, State Public Information Director, Brattleboro, Vermont. The success of the meeting was shown by the numerous requests for the repetition of such events.

At the Annual Meeting of the Junior Section of the Women's Bar Association of the District of Columbia, the following women practitioners in Washington, D. C. were elected to office: Helen Goodner, Chairman; Burleigh Wormington, Vice-Chairman; Kathryn Lawlor, Secretary-Treasurer.

The cooperation of this young women's section has been offered to the Junior Bar Conference of the District of Columbia. Here the Conference also has the cooperation of the Junior Section of the District of Columbia Bar Association, who recently elected the following officers: Chairman, Al Philip Kane; Vice-Chairman, John K. Cunningham; Secretary-Treasurer, Philip Goldstein.

Chairman Foulis Addresses Junior Bar Group

Conference Chairman Ronald J. Foulis, St. Louis, Mo., addressed a joint meeting of the Junior Bar groups of Washington, D. C. on January 30, 1939 on "The Public Information Program and the Bar." Mr. Foulis also described the function of the Conference as that of supplying ideas, man-power, and national-wide experience to local Junior Bar units with a view to eliminating program duplications as well as to assisting Local Junior Sections to carry out their programs. He stressed as one of the most important activities of the Conference the Public Information Program which, he said, was needed to overcome a lack of information on law administration and the bar on the part of the public.

Mr. Foulis also addressed meetings of Junior Bar leaders at New York City and at Newark, N. J. on his recent trip to that section of the country. At New

York City he addressed a group of younger members of the New York State Bar Association who were organizing a Junior Section of the State Association. At Newark, N. J., Mr. Foulis was tendered a luncheon reception by the official Conference family of the State. Arthur T. Vanderbilt of Newark, N. J., Last Retiring President of the American Bar Association, was present and spoke briefly on the need for greater vitality in the organized Bar and pointed out the opportunities of the Junior Bar Conference in this respect.

The Michigan unit of the Junior Bar Conference met at Detroit last month and were addressed by Earl F. Morris, Columbus, Ohio, Council Member from the Sixth Circuit. Oscar C. Hull of the Detroit Bar also addressed the gathering. The meeting was preceded by dinner for members of the Junior Bar Conference officers and their wives at the Intercollegiate Alumni Club, Detroit, Michigan.

Committee on Relations with Law Students Sponsors Meeting

Under the sponsorship of the Conference's Committee on Relations with Law School Students, an American Bar Night was celebrated at the University of Wyoming Law School. This was arranged by the Potter Law Group composed of the members of the law school and faculty. Philip White, George F. Guy, John Miller, James Wilson and James Horiskey, constituted the committee on arrangements and had the cooperation of the law school administration. The work of the Public Information Program, Membership Committee, Legislative Drafting Bureau Committee, and other aspects of the Junior Bar Conference were explained to the gathering.

Frank F. Eckdall, Emporia, Kansas, Chairman of the Committee on Relations with Law Students reports that similar celebrations are being planned to be held at other Law Schools.

A banquet to the eleven newly admitted members of the Bar of New Mexico was sponsored by the New Mexico Unit of the Junior Bar Conference on February 15th. Speakers were Chief Justice Howard L. Bickley, Henry L. Kiker, President of the New Mexico Bar Association, and District Judge David Chavez, Jr. Other guests included Supreme Court Justice Daniel K. Sadler, Justice A. L. Zinn, and members of the Board of Bar Examiners. State Chairman Ross L. Malone, Jr., Roswell, New Mexico, acted as toastmaster. This is the first dinner of its kind held in New Mexico and was a very successful event.

Activity in Louisiana

Activity in Louisiana is being carried on under the chairmanship of Mr. Leon Sarpy, of the faculty of the Loyola University School of Law, New Orleans. Here Dean Paul M. Hebert of the Louisiana State University Law School, Dean Paul Brosman, of the Tulane University Law School and Dean James T. Connor of the Loyola University Law School are giving Mr. Sarpy some important cooperation. Arrangements have been made for speakers on behalf of the Junior Bar Conference to address the graduating classes of these schools shortly before commencement. In addition to the foregoing, T. Hale Boggs, New Orleans, State Membership Chairman, has drawn a program for a membership drive with sub-chairmen and a prepared list of advantages of membership in the Association and Conference for use in the drive. Dean Brosman and Dean Connor, as well as other members of the New Orleans Bar, have already spoken over radio station WWL in furtherance of the public relations program. Brainerd S. Montgomery, New Orleans, as State Public Information director, is in charge of this phase of the work for Louisiana. A regional meeting for Louisiana, Texas, Arkansas and Mississippi is being planned for early Spring.

State Chairman Lawrence Dumas, Jr., Birmingham, Alabama, with the cooperation of Junior Bar members from various parts of the State, has completed plans for Conference activity there during the current year. Frank K. Exum, Birmingham, is in charge of a membership drive in that city. Public Information Directors have been named in three key sections of the State: Alexander A. Marks, Montgomery, for Montgomery and vicinity; Mims Rogers, Florence, for Florence, Tuscumbia, Sheffield and vicinity; and Robert K. Bell, Huntsville, for Huntsville and vicinity. Mr. Dumas will act as director for Birmingham and vicinity. A State Legal Aid Committee for the Conference has been named with George D. Patterson, Birmingham, as Chairman. This committee will study the existing needs for legal aid and with the help of the Public Information program will attempt to disseminate facts about legal aid bureaus and their services. The Alabama program for this year contemplates the Conference sponsorship of a legal institute for the younger members of the bar along the lines of other institutes that have been held recently with noteworthy success.

Junior Bar Setup in Oklahoma

Sixty younger members of the Oklahoma bar representing every section of the State, with James D. Fellers, Oklahoma City, as State Chairman, comprise the official family of the Junior Bar Conference of the "Sooner" State. These include State officers, district councilmen, local Public Information directors, and committeemen. Responsibility for active promotion of the Conference program in Oklahoma now rests with Mr. Fellers, Chairman; Ben Franklin, Oklahoma City, Vice-Chairman; R. Dale Vliet, Oklahoma City, Secretary; William M. Miley, Oklahoma City, Kavanaugh Bush, Tulsa; Julian Fite, Muskogee; Walter Arnote, McAlester; Albert C. Kidd, Wewoka; Rupert Fogg, El Reno; Denver Meacham, Clinton; Reuben K. Sparks, Woodward, District Councilmen; James Cochran, Oklahoma City; and Earl Sneed, Tulsa, Councilmen-at-large. Jack E. High, Oklahoma City, is State Public Information Program Director. Bert E. Barefoot, Jr., Oklahoma City; E. D. Gillespie, Tulsa; William Preston Woodruff, Stilwell; William L. Steger, Durant; Ted R. Fisher, Watonga; George C. Loving, Clinton; M. C. Kratz, Stillwater, and Lawrence R. Smith, Bartlesville, are local Directors. The nine Committee Chairmen are John R. Wallace, Miami, Membership; Everett E. Cotter, Oklahoma City, Activities; Byrne A. Bowman, Oklahoma City, Organization; W. W. Whitman, Jr., Oklahoma City, Legislation; Edward S. Vaught, Jr., Oklahoma City, Relations with Law Students; Charles Fellows, Tulsa, Meetings; Bland West, Norman, Publicity; and Kermit Nash, Drumright, Unauthorized Practice of Law. The annual convention of the State group was held in Oklahoma City, December 28 and 29, in conjunction with the annual meeting of the Oklahoma State Bar. With the thorough organization Mr. Fellers has set up there seems to be ample justification for his message to the Secretary that "The Junior Bar Conference is going to be heard from in Oklahoma."

ARRANGEMENTS FOR ANNUAL MEETING, SAN FRANCISCO, CALIF.,

July 10-14, 1939

Headquarters—Palace Hotel

Hotel accommodations, all with bath, are available as follows:

	Single for 1 person	Double (dbl. bed) 2 persons	Twin Beds for 2 persons	Parlor Suites
Palace	(All space exhausted)			
Bellevue		5.00	6.00	8- 10
Californian	3.50	5.00	6.00	
Canterbury	3.50- 4.00	5.00- 6.00	7.00	10
Clift		7.00	8.00- 9.00	20
Drake-Wiltshire		5.50	7.00	
El Cortez	3.50- 4.50	4.50- 5.50	6.00- 7.00	10- 15
Empire	5.00	*	7.00- 8.00	10- 15
Fairmont	4.00- 8.00	6.00- 10.00	7.00- 12.00	20
Mark Hopkins	5.00- 7.00	8.00- 12.00	8.00- 12.00	20- 25
Maurice	3.50- 4.00	5.00- 6.00	7.00	12
New Olympic	3.50- 4.00	5.00	6.00	10
Plaza		6.00	6.50	
St. Francis		6.50- 7.00	7.00- 12.00	16- 30
Sir Francis Drake		9.00	9.00- 10.00	25- 30
Stewart	3.00- 4.00	4.50- 6.00	4.50- 6.00	7
Western Women's Club (for women only)	3.50		5.00	
Whitcomb	4.50	6.00- 8.00	7.00- 9.00	10- 12

EXPLANATION OF TYPE OF ROOMS

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

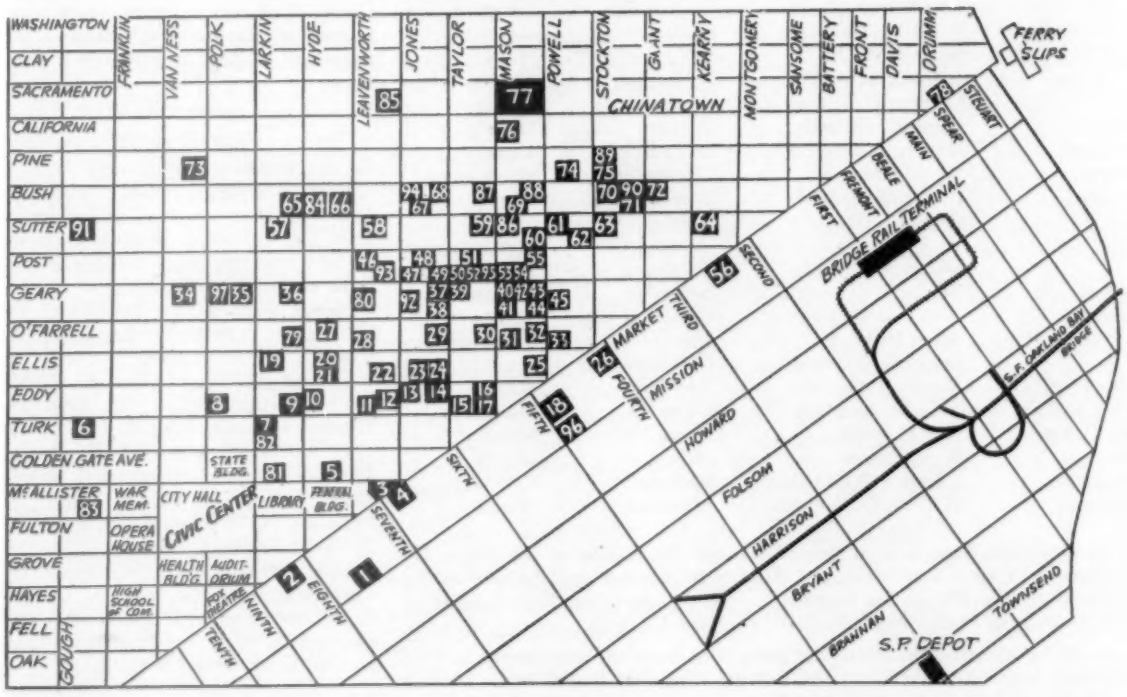
A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, ARRIVAL DATE AND DATE OF DEPARTURE, INCLUDING DEFINITE INFORMATION AS TO WHETHER SUCH ARRIVAL WILL BE IN THE MORNING OR EVENING.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

MAP SHOWS LOCATION OF PRINCIPAL HOTELS



HOTELS

Alexander Hamilton	27	Colonial	74	Glen Royal	66	Maryland	50	Senate	7	Whitcomb	2
Ambassador	16	Commodore	58	Golden State	33	Maurice	46	Senator	20	Worth	48
Angelus	31	Court	70	Gotham	8	Mayflower	54	Shaw	3	Yuba	1
Arlington	28	Crane	43	Granada	65	New Olympic	23	Sir Francis			
Baldwin	71	Davenport	92	Harvard	19	Ormond	21	Drake	61		
Bellevue	37	Drake-Wiltshire	63	Herald	22	Oxford	17	Somerton	82		
Brayton	15	El Cortez	49	Herbert's	32	Padre	12	Stewart	42		
Broadmoor	91	Embassy	5	Keystone	26	Paisley	98	Stratford	45		
Californian	30	Empire	5	King George	40	Palace	56	Sutter	64		
Canterbury	67	Fairmont	77	Lafayette	10	Pickwick	96	Terminal	78		
Carlton	57	Federal	4	Lankershim	18	Plaza	62	Vanderbilt	30		
Cartwright	88	Fielding	83	La Salle	9	Powell	25	Victoria	75		
Cecil	51	Franciscan	54	Leland	73	President	97	Virginia	41		
Chancellor	80	Gartland	39	Lombard	34	Ritz	24	Von Dorn	11		
Clark	14	Gaylord	47	Manx	44	Roosevelt	13	Washington	72		
Clift	36	Geary	93	Mark Hopkins	76	St. Francis	58	West'n Women's			
				Mark Twain	29	San Carlos	94	Club	60		

MEETING PLACES

War Memorial—Veterans Building	45	A
War Memorial—Opera House	64	B
High School of Commerce	78	C
City Hall	30	D
Health Center Building	75	E
State Building	41	F
Exposition Auditorium	11	G
Fox Theatre	72	H
Library		I

APARTMENTS

Pearsonia Apts.	79
Lauard Apartments	80
Plaza Apartments	81
Congress Apartments	82
316 Fulton Street	83
Steinhart Apartments	84
Georgian Court Apts.	85
St. Francis Apartments	86
805 Bush Street	87
Kenilworth Apartments	88
540 Stockton	89
Court Apartments	90

CURRENT EVENTS

(*Continued from page* 183)

expedite appeals from Federal Commissions, administrative authorities, and tribunals, in which the United States is a party or has an interest. This court would be composed of a Chief Justice and ten Associate Justices and would absorb many of the boards and commissions now in existence. A bill, H. R. 234, for the same general purpose has been introduced in the House by Representative Emanuel Celler, of the 10th District of New York, Brooklyn, and referred to the Judiciary Committee.

NOTICE BY BOARD OF ELECTIONS RE ELECTION OF STATE DELEGATES IN 1939

The Board of Elections met on February 13, 1939, and announced that, in accordance with Article V, Section 5, of the Constitution as amended at the Cleveland meeting, there had been the following nominations for the office of State Delegate to be elected in 1939 for a three-year term beginning with the adjournment of the 1939 Annual Meeting.

States where election is to be held	*Nominees*		*Petition Published*
Arizona	J. Early Craig	Phoenix	March
Connecticut	J. F. Berry	Hartford	March
Dist. of Columbia	Henry I. Quinn	Washington	March
Illinois	John R. Snively	Rockford	March
	R. Allan Stephens,	Springfield	February
	Floyd E. Thompson	Chicago	March
Iowa	Jesse A. Miller	Des Moines	March
	John Carlisle Pryor	Burlington	January
Maine	Clement F. Robinson	Portland	January
Michigan	Glenn C. Gillespie	Pontiac	March
Mississippi	Hubert S. Lipscomb	Jackson	January
Montana	W. J. Jameson	Billings	March
Nebraska	Frederick S. Berry	Wayne	March
	George L. DeLacy	Omaha	March
	W. C. Fraser	Omaha	March
	Sidney W. Smith	Omaha	January
New Jersey	Sylvester C. Smith, Jr.	Newark	January
Oklahoma	Welcome D. Pierson	Oklahoma City	March
	Alvin Richards	Tulsa	February
	James S. Twyford	Oklahoma City	March
Puerto Rico	Martin Travieso	San Juan	March
South Carolina	Alva M. Lumpkin	Columbia	February
South Dakota	Roy E. Willy	Sioux Falls	March
Texas	R. G. Storey	Dallas	March
Washington	Laurence R. Hamblen	Spokane	February
Wyoming	William O. Wilson	Cheyenne	March

Arrangements have been completed for the distribution of the ballots, in accordance with the Constitution, and these to be counted must be received by the Board of Elections at the headquarters of the American Bar Association before the close of business at 5:00 P. M. on April 14, 1939.

It will be observed that this year there is at least one nominee in each of the eighteen jurisdictions in which elections are being held, and there are contests for the office of State Delegate in Illinois, Iowa, Nebraska, and Oklahoma. However, in all jurisdictions a vote may be cast for someone other than a nominee whose name appears on the ballot, by writing in a name in the blank space provided and placing X in the square opposite.

ONLY MEMBERS WHO HAVE PAID THEIR DUES FOR THE CURRENT YEAR WILL RECEIVE BALLOTS AS THEY ARE THE ONLY ONES IN GOOD STANDING AND THEREFORE ENTITLED TO VOTE.

The nominating petitions not heretofore published appear below.

BOARD OF ELECTIONS,

EDWARD T. FAIRCHILD, Chairman.

ARIZONA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate J. Early Craig, of Phoenix, Arizona, for the office of State Delegate for and from the State of Arizona, to be elected in 1939:

C. B. Wilson and Chas. B. Wilson, Jr., of Flagstaff; James R. Malott, of Globe; Carl G. Krook and Frank X. Gordon, of Kingman; Harold L. Divelbess, John L. Gust, Ivan Robinette, Fred W. Rosenfeld, Charles A. Carson, Norman S. Hull, William A. Evans, E. E. Ellinwood, John M. Ross, Charles Bernstein, Joseph S. Jenckes, Terrence A. Carson, Herman Lewkowitz, Walter Roche, James W. Cherry, Barnett E. Marks, Richard Fennemore, Henry W. Allen, Walter J. Thalheimer, Henry D. Ross, Louis J. Taylor, Virgil T. Bledsoe, and Ross F. Jones, of Phoenix;

T. J. Byrne, A. H. Favour, J. H. Morgan, Charles E. McDaniel, John R. Franks, Richard Lamson, W. T. Elsing, and Francis D. Crable, of Prescott; M. V. Gibbons, of St. Johns; Ralph W. Bilby, B. G. Thompson, Jas. P. Boyle, Cleon T. Knapp, Gerald Jones, and Francis M. Hartman, of Tucson; E. R. Byers and William B. Fleming, of Williams.

CONNECTICUT

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Joseph F. Berry, of Hartford, Connecticut, for the office of State Delegate for and from the State of Connecticut, to be elected in 1939:

Newell Jennings, of Bristol; C. O. Hincks, of Cheshire; Lawrence A. Howard, of Farmington;

Edward M. Day, Allan K. Smith, Cyril Coleman, Allen E. Brosmith, Warren Maxwell, John B. Lee, F. W. Cole, O. R. Beckwith, R. T. Steele, Alex W. Creedon, Frederick J. Rundbaken, George H. Cohen, Harry W. Reynolds, A. E. Howard, Jr., Anson T. McCook, Edwin S. Thomas, Louis M. Schatz, Barclay Robinson, James W. Carpenter, Julius G. Day, Jr., Charles S. House, Henry P. Bakewell, and Howard W. Alcorn, of Hartford; Olcott D. Smith, of West Hartford.

DISTRICT OF COLUMBIA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Henry I. Quinn, of Washington, D. C. for the office of State Delegate for and from the District of Columbia, to be elected in 1939:

George M. Morris, Frank F. Nesbit, Walter M. Bastian, Wilbur L. Gray, Beatrice A. Clephane, Harry H. Semmes, John W. Cross, Frank J. Hogan, H. C. Kilpatrick, I. Brill, Paul

F. Hannah, Frederick A. Ballard, Frederick L. Pearce, Arthur H. Clephane, S. Warwick Keegin, George H. O'Conner, James Cunningham Rogers, William T. Hannan, Minor Hudson, John H. Pratt, Walter C. Clephane, Wm. H. Donovan, William Campbell Armstrong, Charles E. Pledger, Jr., Nelson T. Hartson, E. H. Jackson, Morris Simon, Lawrence Koenigsberger, and W. E. Cumberland, of Washington, D. C.

ILLINOIS

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate John R. Snively, of Rockford, for the office of State Delegate for and from the State of Illinois, to be elected in 1939:

Charles A. O'Connor, of Aurora; Patrick H. O'Donnell, of Belvidere; Walter F. Dodd, Thomas Francis Howe, Thomas Howe, Henry S. Rademacher, Eugene Quay, Fred B. Hovey, George E. Fink, David Silbert, Sidney C. Nierman, James P. Harrold, Cushman B. Bissell, Charles S. Deneen, John F. Voigt, Thomas C. Angerstein, August F. W. Siebel, Arthur F. Siebel, Victor E. LaRue, Charles E. Woodward, Otis F. Glenn, Dewey F. Fagerburg, Allan T. Gilbert, Thos. J. Downs, Amos H. Watts, Ferre C. Watkins, Glenn G. Paxton, Herbert J. Campbell, Frederick D. Carroll, Charles V. Clark, Philip J. Finnegan, Grover C. Niemeyer of Chicago;

Earl R. Shopen, of Elgin; Marvin F. Burt, A. J. Clarity, Louis F. Reinhold, Robert P. Eckert, Jr., Elwyn R. Shaw and Robert A. Hunter, of Freeport; Robert E. Nash, W. E. Carpenter, Shelby L. Large, John Early, Fred H. Smith, Charles A. Thomas, Alfred B. Louison, Frank Millington Ryan, Thos. W. Gill, C. K. Welsh, William R. Dusher, Edward S. Foltz, Jr., Charles H. Linscott, L. C. Miller, Harry B. Andrews, Edward P. Lathrop, C. A. Pedderson, Robert K. Welsh, John F. McCanna, A. V. Essington, Benjamin B. Early, Harold E. Tobin, of Rockford.

ILLINOIS

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Floyd E. Thompson, of Chicago, for the office of State Delegate for and from the State of Illinois, to be elected in 1939:

Silas H. Strawn, John D. Black, Ralph M. Shaw, James H. Winston, E. G. Ince, Thomas I. Underwood, John C. Slade, Frank B. Gilmer, Andrew W. Sexton, Walter A. Wade, Morrison Waud, Bryce L. Hamilton, Guy A. Gladson, F. C. Hack, Raymond O. Mitchell, Duane T. McNabb, George W. Ott, Richard H. Hollen, Grier D. Patterson, Henry A. Gardner, Alfred T. Carton, Milton H. Gray, Donald P. McFadyen, Arthur D. Chilgren, Erwin W. Roemer, Albert E. Jenner, Jr., Edward R. Johnston, William R. Swissler, Anan Raymond, Frederick Mayer, Herbert C. DeYoung, Edward Hershenson, Charles R. Sprowl, Whitney Campbell, John E. Owens, Francis J. Naphin, Daggett Harvey, Bouton McDougal, Ralph F. Himmelhoch, John Dern, Douglas F. Smith, J. Rockefeller Prentice, Kenneth F. Burgess, Philip H. Schofield, Merritt C. Bragdon, Adlai E. Stevenson, Edwin C. Austin, Philip R. Davis, Joseph G. Gorman, M. B. Kennedy, Henry E. Ayers, Albert Langeluttig, Robert McDougal, Jr., Lowell Hastings, Grover C. McLaren, Stephen A. Cross, Martin J. Teigan, French Waterman, W. R. Arrington, James W. Good, Jr., Glenn E. Baird, Lloyd D. Heth, Joseph F. Grossman, F. Z. Marx, Lambert Kaspers, Joseph E. Fitch, Richard J. Finn, William R. T. Ewen, Wm. H. Sexton, George W. Gale, Douglass Pillinger, Edward R. Adams, William Simon, Robert T. Sherman, Albert S. Barney, Robert W. Wales, Sidney S. Gorham, Jr., Willett N. Gorham, J. C. Lamy, James B. Wescott, David F. Rosenthal, William D. Doggett, Carl Cohn, Frank D. Mayer, Paul M. Godehn, Herbert A. Friedlich, M. Paul Noyes, J. X. Schwartz, Richard Grossman, Louis A. Kohn, Frank S. Sims, Alfred M. Rogers, Daniel J. Schuyler, George W. Lennon, Paul H. Heineke, Frank T. O'Brien, Robert L. Elliott, Jr., J. Alfred Moran, Elsa C. Beck, Robert Bachrach, William A. Ryan, Howard Ellis, Carl S. Lloyd, William Wilson, Joseph H. Pleck, W. A. Keplinger, W. H. Symmes, David Jacker, Charles F. Rathbun, Dwight P. Grenn, Mellen C. Martin, Thomas B. Martineau, Charles F. Grimes, V. M. Welsh, and Walter C. Senne, of Chicago.

IOWA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Jesse A. Miller, of Des Moines, for the office of State Delegate for and from the State of Iowa, to be elected in 1939:

John D. Randall, Wm. W. Crissman, Stewart Holmes, Charles Penningroth, R. D. Taylor, Elmer A. Johnson, B. L. Wick, A. H. Sargent, T. M. Ingersoll, J. M. Grimm, H. C. Ring, W. J. Barngrover, and V. C. Shuttleworth, of Cedar Rapids; Raymond A. Smith, Henry K. Peterson, Folsom Everest, J. A. Williams, and Karl F. Geiser, of Council Bluffs; Wayne G. Cook, E. J. Carroll, Edward A. Doerr, Alfred C. Mueller, Merrill M. Blackburn, Carl H. Lambach and F. C. Harrison, of Davenport;

Ralph N. Lynch, Paul G. James, Clyde B. Charlton, Earl C. Mills, Gibson C. Holliday, Thos. J. Guthrie, Ray Nyemaster, Jr., Owen Cunningham, Maxwell A. O'Brien, J. L. Parrish, Jr., Harry E. Beach, Loy Ladd, C. Moriarty, Walter K. Stewart, Ben J. Gibson, R. L. Read, J. G. Gamble, A. B. Howland, Frank W. Davis, Elizabeth Hyde, Howard J. Clark, James E. Goodwin, A. R. Shepherd, and C. O. Switzer, of Des Moines;

H. C. Kenline, Hal F. Reynolds, Robert Kenline, W. A. Smith, M. H. Czizek, E. E. Bowen, F. D. Gilloon, John G. Chalmers and Robt. W. Clewell, of Dubuque; G. L. Norman, William Swasey Timberman, E. W. McManus, and Wm. R. Sheridan, of Keokuk; Earl Smith, R. F. Clough, Garfield E. Breese, Jno. A. Senneff, and Jno. Senneff, Jr., of Mason City; James A. Devitt, Leroy E. Corlett, Irvin C. Johnson, John N. McCoy, Frank T. Nash, W. H. Keating, and Thomas J. Bray, of Oskaloosa; F. F. Faville, David W. Stewart, R. H. Hatfield, Egbert M. Badgerow, Lester C. Davidson, H. C. Harper, and J. C. Sinclair, of Sioux City; Carleton Sias, B. F. Swisher, and John S. Tuthill, of Waterloo; Charles D. Van Werden, Leo C. Percival, and Shirley A. Webster, of Winterset.

MICHIGAN

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Glenn C. Gillespie, of Pontiac, for the office of State Delegate for and from the State of Michigan, to be elected in 1939:

Wm. J. Kearney, of Albion; Roscoe O. Bonisteel, Frank B. Devine, George W. Sample, George J. Burke, Paul A. Leidy, E. Blythe Stason, and Edwin C. Goddard, of Ann Arbor; Cyrus J. Goodrich, Ira B. Beck, John A. Mustard, Russell Conroy, Manlius M. Perrett, Jr., and J. L. Mecham, of Battle Creek;

Frank D. Eaman, Arthur Webster, Henry I. Armstrong, Jr., Paul W. Voorhies, Thomas G. Long, Carl V. Essery, William C. Allee, Alfred Lindbloom, John M. Hudson, Laurence M. Sprague, Frank E. Cooper, James Dresbach, Ralph A. Mayer, Joseph A. Moynihan, Franklin D. Hepburn, James I. McClintock, A. Lee Henson, Shirley T. Johnson, R. M. Waterman, Henry C. Bogle, Thomas J. Hughes, Austin Fleming, George E. Brand, Ben O. Shepherd, Ezra W. Lockwood, Walter I. McKenzie, Milo H. Crawford, Lester P. Dodd, Oscar C. Hull, Lawrence E. Brown, and Harvey A. Fischer, of Detroit;

Ralph E. Gault and Roy E. Brownell, of Flint; Julius H. Amberg, Roger C.

Butterfield, Roger B. Keeney, Harry Shulsky, Willard F. Keeney, David A. Warner, Siegel W. Judd, Conrad E. Thornquist, and Gordon B. Wheeler, of Grand Rapids; Walter S. Foster, W. S. Cameron, Dean W. Kelley, Joseph W. Plancke, Clayton F. Jennings, David R. Bishop, Richard A. Parsons, and Byron L. Ballard, of Lansing; Ralph R. Eldredge and Adda Eldridge, of Marquette; Ralph T. Keeling and W. E. C. Huthwaite, of Pontiac; George C. Watson, J. F. Wilson, Shirley Stewart, and William O. Covington, of Port Huron; Roberts P. Hudson of Sault Ste. Marie.

MONTANA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate W. J. Jameson, of Billings, for the office of State Delegate for and from the State of Montana, to be elected in 1939:

H. J. Coleman, R. G. Wiggenhorn, Ben Harwood, H. C. Crippen, Horace S. Davis, Melvin N. Hoiness, and Rockwood Brown, of Billings; Robert D. Corette, James T. Finlen, Jr., W. H. Hoover, John V. Dwyer, W. M. Kirkpatrick, D. M. Kelly, and John E. Corette, of Butte; Julius J. Wuerthner, O. B. Kotz, H. C. Hall, H. B. Hoffman, R. H. Glover, and J. P. Freeman, of Great Falls; A. F. Lamey, of Havre; M. S. Gunn, E. M. Hull, Carl Rasch, and Milton C. Gunn, of Helena.

NEBRASKA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Frederick S. Berry, of Wayne, for the office of State Delegate for and from the State of Nebraska, to be elected in 1939:

G. A. Farman, Jr., of Ainsworth; D. R. Mounts, of Atkinson; Wayne A. Davies, of Butte; W. A. Meserve, of Creighton; Sherman W. McKinley, of Dakota City; S. S. Sidner, John L. Cutright, and C. E. Abbott, of Fremont; Clarence E. Haley, of Hartington;

Clarence A. Davis, M. V. Beghtol, F. B. Baylor, Guy C. Chambers, Don W. Stewart, E. F. Carter, Geo. H. Turner, George A. Eberly, W. B. Rose, Robt. G. Simmons, Charles B. Paine, Charles H. Flansburg, Arthur A. Whitworth, Bernard S. Gradwohl, C. Petrus Peterson, Charles Ledwith, William I. Aitken, R. W. Devoe, John J. Wilson, C. J. Campbell, A. W. Field, Frank Boehmer, L. A. Ricketts, Lewis R. Ricketts, C. C. Cartney, C. L. Rein, and C. L. Clark, of Lincoln;

John A. Young, of Lyons; Geo. H. Moyer, of Madison; Lyle E. Jackson and Elmer C. Rakow, of Neligh; R. J. Shurtleff, Charles H. Kelsey, Hadley Kelsey, and Frederick M. Deutsch, of Norfalk; John L. Barton, Howard Kennedy, III, Keneth S. Finlayson, Clarence T. Spier, Alexander McKie, Jr., William Ritchie, Barton H. Kuhns, Hyle G. Burke, C. P. Randall, David A. Fitch, and Robert A. Fitch, of Omaha; Julius D. Cronin, of O'Neill; E. D. Beech, of Pierce; C. M. Kingsbury, of Ponca; W. B. Sadilek and L. F. Otradovsky, of Schuyler; Harold M. Schultz, of Scribner; Adolph E. Wenke, of Stanton; Robert R. Moodie, of West Point; H. M. Nicholson, of Wisner.

NEBRASKA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate George L. DeLacy, of Omaha, Nebraska, for the office of State Delegate for and from the State of Nebraska, to be elected in 1939:

Guy C. Chambers, M. V. Beghtol, T. S. Allen, Thomas C. Woods, William I. Aitken, Frank D. Williams, Earl Cline, F. B. Baylor, Leonard A. Flansburg, and Lyle C. Holland, of Lincoln;

F. S. Gaines, C. J. Baird, Geo. N. Mecham, R. B. Hasselquist, C. F. Connolly, W. C. Fraser, Edson Smith, James J. Fitzgerald, Jr., A. G. Ellick, E. J. Shoemaker, John L. Barton, Robert D. Neely, Milton R. Abrahams, Geo. B. Boland, Fred N. Hellner, Clinton Brome, Herbert M. Fischer, Edward F. Fogarty, Stanley M. Rosewater, Harry W. Shackelford, V. E. Spittler, of Omaha.

NEBRASKA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate W. C. Fraser, of Omaha, for the office of State Delegate for and from the State of Nebraska, to be elected in 1939:

John W. Delehant, M. S. Hevelone, Samuel Rinaker, Cloyde B. Ellis, and H. E. Sackett, of Beatrice; H. G. Wellensiek, Bayard H. Paine, Jr., Jac Crawford, and Louis A. Holmes, of Grand Island; Harry F. Russell, Lawrence S. Dunmire, Roscoe S. Hewitt, Walter M. Crow, Charles E. Bruckman, and George G. Cronkelton, of Hastings; H. L. Blackledge, of Kearney; Frank D. Williams, Earle Cline, Charles Ledwith, Robert Van Pelt, Ernest B. Perry, Frank Boehmer, Leonard A. Flansburg, F. B. Baylor, Don W. Stewart, Mark Simons, and Clinton J. Campbell, of Lincoln; Paul Jessen and John M. Dierks, of Nebraska City; Charles H. Kesley, Frederick M. Deutsch, R. J. Shurtleff, and Hadley Kelsey, of Norfolk; Murl M. Maupin, of North Platte;

C. J. Baird, William J. Baird, George L. DeLacy, Gilbert P. Hansen, R. B. Hasselquist, O. E. Johnson, Harry W. Shackelford, Stanley M. Rosewater, George N. Mecham, V. E. Spittler, Herbert E. Story, F. S. Gaines, Ralph E. Svoboda, Edwin Cassem, Yale C. Holland, Wm. J. Hotz, Lawrence W. Moore, James J. Fitzgerald, Jr., A. G. Ellick, Ben E. Kazlowsky, John A. McKenzie, Rainey T. Wells, L. J. TePoel, Henry E. Maxwell, Hyle G. Burke, C. P. Randall, Tracy J. Peycke, John A. Bennewitz, W. J. Schall, Ambrose C. Epperson, Robert D. Neely, W. M. Giller, George D. Keller, E. J. Shoemaker, John H. Trennery, Jr., Albert L. Ramacciotti, Alexander McKie, Jr., Howard Kennedy, Isidor Ziegler, Herbert W. Fischer, H. S. Lower, Quintard Joyner, E. K. McDermott, William H. Wright, Fred A. Wright, Hird Stryker, C. F. Connolly, W. M. McFarland, Raymond G. Young, William Grodinsky, Sherman Welpton, Jr., L. R. Newkirk, Abel V. Shotwell, Frank H. Woodland, Arthur R. Wells, Winthrop B. Lane, Paul L. Martin, Casper Y. Offutt, George W. Pratt, Daniel J. Monen, Clinton Brome, L. F. Crofoot, Amos Thomas, Winfield R. Ross, Verne W. Vance, and Nelson C. Pratt, of Omaha;

A. H. Atkins, Floyd E. Wright, T. M. Morrow, and R. T. York, of Scottsbluff.

OKLAHOMA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Welcome D. Pierson, of Oklahoma City, for the office of State Delegate for and from the State of Oklahoma, to be elected in 1939:

Rex Belisle, Harry W. Priest, Harold C. Thurman, Hal C. Thurman, W. A. Lybrand, Henry G. Snyder, John H. Cantrell, Duke Duvall, John B. Dudley, Jr., C. E. Johnson, V. P. Crowe, Raymond A. Tolbert, R. M. Williams, Leo Considine, F. A. Rittenhouse, Walter D. Hanson, A. W. Gilliland, K. W. Shartel, D. A. Richardson, Fred M. Mock, Truman B. Rucker, Clayton B. Pierce, Lynn Adams, Claude Monnet, Coleman Hayes, Fisher Ames, Russell V. Johnson, Lee B. Thompson, H. L. Douglass, J. B. Dudley, John F. Butler, Everett E. Cotter, Stephen Chandler, John F. Webster, Byrne A. Bowman, George M. Nicholson, R. B. F. Hummer, R. M. Rainey, George M. Green, Frank G. Anderson and Streeter B. Flynn, of Oklahoma City;

John T. Craig, Wm. S. Hamilton, John R. Pearson, Frank T. McCoy, Jr., Joseph D. Mitchell, Frank T. McCoy, A. S. Sands and John L. Arrington, of Pawhuska; Logan Stephenson, Q. M. Dickason, Samuel A. Boorstin, B. A. Hamilton, and Saul A. Yager, of Tulsa.

OKLAHOMA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate James S. Twyford, of Oklahoma City, for the office of State Delegate for and from the State of Oklahoma, to be elected in 1939:

A. W. Gilliland, K. W. Shartel, D. A. Richardson, Leo Considine, C. B. Cochran, Fisher Ames, John F. Butler, Claude Monnet, Charles E. France, Russell V. Johnson, Fred B. Scholwald, R. M. Williams, Clayton B. Pierce, V. P. Crowe, James D. Fellers, Lee B. Thompson, Edward Howell, W. R. Withington, D. I. Johnston, Roy C. Lytle, J. B. Dudley, J. B. Dudley, Jr., M. S. Douglass, Lynn Adams, H. L. Douglass, J. H. Everest, Stephen Chandler, Troy Shelton, R. W. Fowler, John H. Halley, Philip Pierce, L. G. Kneeland, Bruce McClelland, Jr., Hal Whitten, G. A. Paul, George H. Shirk, James S. Twyford, and Maurice M. Thomas, of Oklahoma City.

PUERTO RICO

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Martin Travieso, of San Juan, P. R., for the office of State Delegate for and from the Territory of Puerto Rico, to be elected in 1939:

Eulogio Riera, B. Marrero-Rios, A. R. de Jesus, A. Gonzalez-Lamas, F. Fernandez Cuyar, Jose Lopez-Baralt, Hector Gonzalez-Blanes, Mariano Acosta-Velarde, Benjamin Ortiz, E. Martinez-Rivera, B. Sanchez-Castano, R. Castro-Fernandez, Felix Ochoteco, Jr., Jose L. Hernandez-Usera, L. E. Dubon, Daniel F. Kelley, E. T. Fiddler, Emilio del Toro, C. H. Julia of San Juan.

J. A. Valdes, R. Yordan-Pasarell, Tomas I. Nido, E. Frank Martinez, Cesar A. Montilla, Antonio Riera of Santurce.

SOUTH DAKOTA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Roy E. Willy, of Sioux Falls, South Dakota, for the office of State Delegate for and from the State of South Dakota, to be elected in 1939:

Dwight Campbell and St. Clair Smith, of Aberdeen; Leonard M. Simons, of Belle Fourche; M. A. Brown, of Chamberlain; Clifford A. Wilson, of Hot Springs; Lewis Benson and Max Royhl, of Huron; Merrell Quentin Sharpe, of Kennebec; Leo D. Heck, of Kimball; Kenneth Chambers Kellar, of Lead; Karl Goldsmith, Ray F. Drewry, Ernest W. Stephens, and D. J. O'Keeffe, of Pierre; George T. Mickelson, of Selby;

Theodore M. Bailey, Melvin T. Woods, R. A. Bielski, D. S. Elliott, B. O. Stordahl, Herman F. Chapman, Peter G. Honegger, Clarence C. Caldwell, Frank Wickhem, John P. McQuillen, Verne H. Jennings, James O. Berdahl, John Harold Fitzpatrick, George J. Danforth, G. J. Danforth, Jr., A. L. Wyman, Louis N. Crill, Eugene C. Mahoney, Theodore R. Johnson, Ransom L. Gibbs, John H. Voorhees, Howell L. Fuller, Gale B. Braithwaite, Rex M. Warren, John S. Murphy, Sioux K. Grigsby, Roy D. Burns, and Holton Davenport, of Sioux Falls; Alan L. Austin, of Watertown; H. O. Lund, of Winner.

TEXAS

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate R. G. Storey of Dallas, Texas, for the office of State Delegate for and from the State of Texas, to be elected in 1939:

Clint C. Small of Amarillo; Dan Moody, of Austin; Walter C. Woodward and E. M. Critz, of Coleman; Julian P. Harrison, of El Paso; R. E. Hardwicke, of Fort Worth;

W. N. Arnold, Jr., Ernest A. Knipp, A. Milton Vance, Edward S. Boyles, W. B. Bates, M. C. Chiles, C. A. Leddy, Leon Jaworski, Carl G. Stearns, James C. Boone, Dan W. Jackson, Wm. N. Bonner, Jas. L. Shepherd, Jr., W. M. Ryan, George T. Barrow, John T. McCullough, P. R. Rowe, Jr., A. H. Fulbright, J. C. Hutcheson, III, Dillon Anderson, Joe Ingraham, F. G. Coates, Ralph B. Feagin, Jas. A. Baker, Jr., John P. Bullington, Walter H. Walne, Jesse Andrews, R. Wayne Lawler, Ralph R. Wood, Harry Holmes, Maurice Epstein, W. Noble Carl, F. Warren Hicks, W. L. Kemper, Lewis H. Follett, J. W. Lockett, Fred W. Moore, Eldon Young and H. F. Montgomery, of Houston;

Angus G. Wynne, of Longview; Allan Shivers, of Port Arthur; W. B. Jack Ball, W. E. Remy, Jr., A. N. Moursund, S. S. Searcy, and Carl Wright Johnson, of San Antonio; F. W. Fischer and Gordon Simpson, of Tyler.

WYOMING

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate William O. Wilson, of Cheyenne, Wyoming, for the office of State Delegate for and from the State of Wyoming, to be elected in 1939:

Seymour S. Bernfield, Harold H. Healy, E. E. Enterline, G. R. Hagens, William J. Wehrli, Robert R. Rose, E. E. Murane, and R. H. Nichols, of Casper;

Carlton A. Lathrop, C. R. Ellery, George E. Brimmer, Ralph Kimball, John U. Loomis, James A. Greenwood, George F. Guy, T. Blake Kennedy, Joseph C. O'Mahoney, and Clarence A. Swainson, of Cheyenne; Ernest J. Goppert and Milward L. Simpson, of Cody; Joseph Garst, of Douglas;

Payson W. Spaulding, R. Dwight Wallace, Louis Kabell, Jr., and Samuel Corson, of Evanston; F. A. Little, of Greybull; Wilford W. Neilson, of Jackson; Glenn Parker, of Laramie; Frank A. Barrett, of Lusk; Preston T. McAvoy and Harry P. Ilsley, of Newcastle;

Clarence A. Brimmer, Lawrence E. Armstrong, and Stairs Kenneth Briggs, of Rawlins; Lewis H. Brown and Thomas Seedon Taliaferro, Jr., of Rock Springs; H. Glenn Kinsley, D. P. B. Marshall, John G. Hutton and Charles A. Kutcher, of Sheridan.

New Civil Liberties Unit—Commercial Frauds Unit

There has been established in the Department of Justice a unit to investigate and conduct prosecutions of violation of Civil Liberties as guaranteed under the Constitution. This new Civil Liberties Unit is in the Criminal Division and Henry A. Schweinhaut has been designated as its chief. He is a special assistant to the Attorney General. Among its duties will be the making of a study of the Constitution and acts of Congress relating to civil rights with especial reference to present conditions; and later it will expect to make recommendations for such revisions as may seem desirable.

Another new unit, also in the Criminal Division of the Department of Justice, is the Commercial Frauds Unit, with J. Albert Woll, special assistant to the Attorney General, as its chief. The purpose of the unit is to facilitate closer cooperation with all federal agencies in an effort to curb commercial frauds. Full cooperation with this purpose has been assured by the Post Office Department and the Securities and Exchange Commission. The new unit will supervise prosecutions under the Securities Act of 1933, the Securities and Exchange Act of 1934, and the federal mail frauds statutes. The establishment of such a unit was deemed advisable because of the view that the interest, not only of the investing public but of the entire financial and economic structure of the country, would be served by an intensive effort to stamp out all commercial and other fraud schemes.

News of the Bar Associations

District of Columbia Bar Association Holds Spirited and Constructive Meeting—Unusual Attendance—Committee on Suppression of Unauthorized Practice Authorized to File Petition for Rehearing—New Officers

RENEWED evidence of the interest taken by the members of the Bar Association of the District of Columbia was given at the Annual Meeting held on January 17, 1939. An unusually large attendance of members participated in a meeting that was both spirited and constructive.

While the matter of the election of officers for the ensuing year was one that accounted for the presence of many, a volume of other matters attracted equal attention. A list of the newly elected officers and directors follows:

Sefton Darr, President; James C. Wilkes, First Vice-President; Bernard G. Ostmann, Second Vice-President; E. Barrett Prettyman, David A. Hart, and Chas. V. Imlay, Directors.

Wilbur L. Gray and Francis W. Hill, Jr., were reelected Secretary and Treasurer respectively, without opposition. The following directors were carried over for one year: Robert F. Cogswell, John J. Carmody and Joseph T. Sherier.

The Committee of Nine, appointed for consideration of pending legislation, submitted a most thorough and painstaking report. Its recommendations, including the Four Point Program of the American Bar Association, were adopted after much discussion and debate.

Equally important to the members of our Association, and perhaps to all lawyers everywhere, was the report of the Committee on Suppression of Unauthorized Practice of Law. Its report considered in detail the opinion of the United States Court of Appeals for the District of Columbia, in the case brought by this committee against one of the local banks and trust companies. The suit was brought to obtain a definite ruling on the extent to which a bank or trust company might go before encroaching on the rights of lawyers, and the relief sought was denied. The committee report was an exhaustive one and indicated that the members had devoted themselves fully to study of the problem. Subsequently, the committee was authorized to file a petition for rehearing in the case.

The Library Committee made a splendid report, indicating that the library of the Association was being maintained in an adequate and complete manner.

Other reports made included those by the Grievance Committee, Committee on Civil Rights, Admissions and Relations with the Various Courts as well as with the Public.

It is most gratifying to report that the Association enjoyed an excellent year in every respect; that the members are all keenly interested and active in its affairs; and, that with the elections of the new officers and directors named above, the outlook for the coming year seems exceedingly bright.

WILBUR L. GRAY,
Secretary.

SEFTON DARR
President Bar Assoc. of D. C.

Nebraska State Bar Holds First Meeting Since Integration—President Johnsen Reports Progress during Year—Interesting Section Meetings—Referendum on Recommendation That Legislature Pass Act Looking toward Promulgation of Rules of Practice and Procedure by Supreme Court

THE 1938 meeting of the Nebraska State Bar Association held on December 28th and 29th at Hotel Cornhusker in Lincoln was the 39th annual meeting of the bar of this state but the first as an integrated bar. Under the voluntary plan of bar organization the attendance at annual meetings averaged about 400, but a total of 843 were registered at this year's meeting and it is estimated that at least 100 more were in attendance without the formality of registration. Two weeks prior to the opening of the convention each member of the bar had received a program containing the reports of each standing and special committee, which reports were summarized by the committee chairman and submitted to the assemblage for discussion and approval or modification.

The address delivered by President Harvey Johnsen at the opening session on Wednesday was a report of the progress of the Association during its first year as an integrated bar and contained suggestions for the future program of the Association based on his ten years' experience as Secretary of the voluntary bar association and his year as President under the new type of organization. On January 3, 1939, President Johnsen became a member of the Supreme Court of Nebraska, having been appointed by Governor Cochran to succeed the late L. B. Day. The principal speaker for the Wednesday afternoon session was Stanley B. Houck of Minneapolis, whose topic was "Permissible and Prohibited Activities of Adjusters and Accountants." The address was of particular interest to the Association because of the excellence of the report of the Nebraska Committee on Unauthorized Practice, which was presented by Chairman A. V. Shotwell of Omaha at the same session.

The largest annual dinner in the history of the Nebraska Bar was held on Wednesday evening at Hotel Cornhusker. The inimitable H. T. Harrison, of Little Rock, Arkansas, was the banquet speaker. His address on "Unwise Cracks—Dogmatisms of a Barking Dog" was a decided hit with the 430 lawyers in attendance. Special guests at the banquet were G. Dexter Blount, of

Denver, President of the Colorado Bar Association; I. M. Platt, of Junction City, President of the Kansas Bar Association, and Roy T. Willy, of Sioux Falls, President of the South Dakota Bar Association.

For the past three years this Association has followed the plan of holding sectional meetings and Thursday forenoon was devoted to this phase of the convention. At the meeting of the Insurance Law Section papers were read by William I. Aitken of Lincoln, on "Use of Federal Declaratory Judgment Act by Parties in Cases Involving Insurance Contracts"; J. L. Cleary of Grand Island, on "Res Ipsa Loquitur Doctrine in Nebraska"; Ed R. Morrisson, of Kansas City on "Net Value of Life Insurance Policies Under Non-Forfeiture Statutes"; John A. Appleman of Chicago, on "What Accidents Are Covered by an Automobile Policy." The Section on Real Estate Law devoted its program to examination of titles and received papers on "Nebraska Curative Acts" by Perry W. Morton and Lewis R. Ricketts, of Lincoln; "The Over-Meticulous Title Examiner as a Nuisance to the Public and to the Profession" by R. O. Williams, of Lincoln; and "The Dodge County Experiment" by Arthur C. Sidner, of Fremont. The program of the Municipal Law Section consisted of addresses by Robert D. Flory, of Columbus, on "Liquor Control Legislation"; "Establishment, Maintenance and Regulation of Tourist and Trailer Camps by Municipalities" by Donald F. Sampson, of Central City; and a discussion of public and private utilities by Varro E. Tyler, of Nebraska City. The Social Security Section was

JAMES M. LANIGAN
President Neb. St. Bar Assoc.

addressed by Louis Schneider, of Minneapolis, who spoke on "Social Security Act in Operation." The Junior Bar Section considered fees, ethics and publicity, and received papers by Bernard McNeny, of Red Cloud; James A. Doyle, of Lincoln; and John M. Gepson, of Omaha. A newly created Section on Law Office Management had as its speaker Dwight G. McCarthy, of Emmetsburg, Iowa, on "The Value of Office Management"; Maxwell V. Beghtol, of Lincoln, on "Organization and Operation of the Office"; Edwin Cassem, of Omaha on "Law Libraries"; and Claude A. Davis, of Grand Island, on "Fee Schedules."

Speakers at the Thursday afternoon session were Judge Joseph A. Moynihan, of Detroit, whose subject was "Pre-Trial Practice & Procedure"; Col. O. R. McGuire, of Arlington, Va., on "Governments in a Changing World"; and Professor Edson R. Sunderland, of the University of Michigan Law School, who spoke on "The Scope of Judicial Review."

The report submitted by the Committee on Legislation contained a recommendation that the Nebraska Legislature pass an act looking toward the promulgation by the Supreme Court of rules of practice and procedure for all courts, following in substance the method used in the adoption of the Federal Rules. Because of the importance of the proposal it was thought wise to submit the plan to a referendum vote of all members of the Association. To this end a ballot has been sent to each active member for an expression of approval or disapproval of the proposed act. The ballots are being returned by a large percentage of the members of the Bar and at this date 76% of those who have voted have registered their approval.

The assembly adopted the report of the Committee on Judicial Council in which it was recommended that the President of the Association appoint a committee of five members to present to the Supreme Court the request of the Association for the establishment of such a council by rule of the Court. The report further suggested that the proposed Judicial Council consist of eleven members, including one justice of the Supreme Court, one judge of the District Court, one county judge, one member of the law faculty from each of the accredited law colleges, and six practicing attorneys. The newly elected President will shortly appoint a committee to present the matter to the Supreme Court pursuant to the action of the Association.

In the report of the Committee on Judicial Selection, it was recommended that a referendum vote be taken of all members of the Association on the question of whether or not they favor a change in the selection of District and Supreme Court judges from an elective to a non-political appointive system. This referendum will be taken during the year and if a substantial majority of the members of the Bar indicate such a sentiment, a proposed constitutional amendment will be submitted for the consideration of the Bar at its 1939 annual meeting.

Officers selected are: President—James M. Lanigan of Greeley; Vice-Presidents—Raymond M. Crossman of Omaha, Arthur A. Whitworth of Lincoln, and Frank A. Anderson of Holdrege; Member at Large of the Executive Council — Sterling F. Mutz of Lincoln; and Member of the House of Delegates of the American Bar Association—James G. Mothersead of Scottsbluff.

The 1939 annual meeting will be held on December 27th and 28th, 1939, at Omaha.

GEORGE H. TURNER,
Secretary and Treasurer.

Sixty-Second Annual Meeting of New York State Bar Association Concerns Itself with Both National and International Situation—Committee on Civil Liberties Created—Symposium on Review of Decisions of Quasi-Judicial Government Agencies—Distinguished Speakers etc.

THE Sixty-Second Annual Meeting of the New York State Bar Association in New York City, January 26, 27 and 28 was highlighted by creation of a Committee on Civil Liberties, a recommendation that the Dies Committee investigating Unamerican Activities be continued and a symposium on the power of the courts to review the decisions of quasi-judicial governmental agencies.

The meeting also concerned itself with the foreign situation. Undersecretary of State Sumner Welles was the principal speaker of the session. In his speech on some aspects of the foreign policy of the United States he said that the country's major objective is to keep this country at peace with the world. At its concluding session the members approved a resolution calling on the legal profession to be vigilant to prevent any spread to this country of conditions which exist in some totalitarian states.

The national situation also came in for consideration with United States Senator Edward R. Burke, of Nebraska, asserting that the United States will be on the brink of its greatest spending orgy if President Roosevelt's recommendations are accepted, and Frank J. Hogan, President of the American Bar Association, assailing the Wagner Labor Relations act and calling for amendments to make it fair to employers.

Fred L. Gross, of Brooklyn, was named President of the Association for the ensuing year. He succeeds former Supreme Court Justice Joseph Rosch, of Albany. Former State Senator Charles W. Walton of Kingston was re-elected Secretary and Harry M. Ingram, of Potsdam, was re-elected Treasurer.

Reports of more than a score of committees were presented at the meeting, detailing the year's work and making recommendations for the future. These ranged all the way from the report of a committee on automobile accident prevention, which urged strict enforcement of a 55-mile-an-hour state speed limit, to a recommendation of the Committee on International Law, which proposed that the government continue its efforts to obtain formal agreement of world powers to outlaw air bombing of civilian populations. Among them were the report of the Committee on American Citizenship in which was contained the recommendation that the work of the Dies Committee "be encouraged and continued." The report admitted that the committee could not agree on the propriety of the committee's procedure but explained that its purposes are essentially American. It also urged investigation of obstructive criticism or scoffing at the committee's work for "alien and un-American motives."

HON. FRED L. GROSS
President N. Y. State Bar Assoc.

The new committee on Civil Liberties was created by the Executive Committee and President Rosch appointed Grenville Clark, of New York City, as Chairman. The committee membership was not named immediately. The committee will work along the same lines as the committee created by the American Bar Association last year. In addition to concentrating on violation of the constitutional rights of freedom of speech, of press and of assembly, the committee will undertake to defend those who are sentenced without due process of law and those who are subjected to improper interference by Federal agencies.

Edward Gluck, of New York, Chairman of the Committee on Administrative Law, presented the principal paper in a symposium on the question: "Resolved that the power of the courts to review the determinations of quasi-judicial agencies be enlarged."

Mr. Gluck did not take any definite stand on the question, nor did the Association. He said that some of the criticism of such agencies as the National Labor Relations Board might be alleviated if the prosecuting function were separated from the judicial function and if the personnel were improved through appointment of men "who not only are, but appear to be, unbiased and impartial when they sit in the capacity of judges."

He said that proponents of wider judicial power over the determinations of quasi-judicial agencies were not motivated by any desire to hamstring the agencies, but rather to increase public acceptance of their rulings. He added: "It is probable that the most important reason for criticism of the activities of administrative agencies recently has been the feeling that individuals before

them have not been getting fair hearings."

After Mr. Gluck's presentation of the problem ten members of the Association presented brief discussions of particular phases of it.

After the debate, President Rosch presented the president's annual address in which he said that it is the duty of lawyers, individually and through associations and organizations, "to battle for the preservation of the respected position and the sacred principles of the democratic form of government."

Reviewing the year's work he said that the plan for a mid-summer meeting, inaugurated last year in connection with the State Constitutional Convention, would be continued. Reorganization of the Association has been proposed, he said, and proponents of changes should be given a careful hearing. Mr. Rosch expressed the opinion, however, that a marked increase in membership would solve the Association's problem of providing and continuing the services already inaugurated.

Mr. Rosch further stated that the New York State Bar Association is one of the oldest and one of the most active State Associations in the country and has rendered the profession, as a whole, "a great service in advancing as well as cultivating the science of jurisprudence, advocating, assisting and bringing about reforms in the law and carrying out the purposes of its organization."

An interesting feature of the session was a paper presented by Professor Fleming James, Jr., of the Yale Law School, and Director of Research of the New York Law Society, who discussed the new Federal rules of Civil Procedure, particularly provision for pre-trial examination, depositions and discovery, which he said would aid to speed litigation and help to bring the courts up to date in their work. Use of discovery procedure in automobile accident and other negligence suits would be the greatest aid to speeding court procedure, he said, since statistics show that the tort jury case is the crux of congested dockets. Explaining that it occupies the lion's share of the jury calendar, Professor James said it creates delays which can ill be borne by plaintiffs in the very type of case concerned.

Trial delays and slow court procedure have created public dissatisfaction with the way the courts and lawyers are handling the entire accident problem, he said. The criticism does not come from a "lunatic fringe," he added, and cannot lightly be waved aside.

"Unless we find a reasonably adequate answer to it, our generation of lawyers may live to see a complete change in the substantive law of torts and the rise of yet another set of administrative tribunals to dispense it," he warned. "If we believe a less radical solution is wiser, we must set our house in order. I submit the greatest step we can take in this direction is the modernizing of the judicial administration so that there will be speedier and more certain redress for accident victims."

Chief Judge Frederick E. Crane of the Court of Appeals, addressing the meeting's annual dinner as the State's highest judicial officer, also touched on the problem of congested courts. He said that when he was appointed to the high bench in 1917 the court was two and a half years behind in its work. While the court normally consists of seven judges, ten were named and served in relays. Constitutional amendments giving the Appellate Divisions of the Supreme Court greater authority and reducing the number of appeals from their decisions finally abolished the congestion so that now the court is keeping up with the cases. About 700 cases and 750 motions are disposed of annually.

Chief Justice Crane, who retires from the State Court of Appeals at the end of this year under the Constitutional age limit of 70, paid high tribute to his associates in the Supreme Court and the

Court of Appeals. He also praised the "American system—full and free debate and a decision by majority vote," terming it America's challenge to force in which must be placed "our everlasting hope."

Other dinner speakers were Weston Vernon, Jr., of New York, President of the Young Lawyers' Section of the Association, who pledged the services of young lawyers to any program to help maintain democratic rights, and Frank J. Hogan, President of the American Bar Association. Mr. Hogan urged a revision of the present Labor Relations Act to make it fair to both employers and employes.

Weekly Legal Newspaper Established

"AMERICAN LAW AND LAWYERS," a weekly newspaper devoted to "law, government, the legal profession in action," made its first appearance under date of January 7.

This newspaper, according to its publishers, is intended not only to bring the lawyer a fund of information useful in his daily practice but also to serve as a national integrating agency, seeking the development of a sense of national unity in the profession, the collective solution of common professional problems and advancement of all that tends to increase the profession's social usefulness and its prestige with the public.

The news material for "American Law and Lawyers" is that which is gathered from all parts of the country and disseminated to 25 legal publications by Court and Commercial Newspaper Syndicate, Cincinnati. These publications circulate locally in as many of the principal cities from coast to coast. In a few instances they cover an entire state. In many states and in a great number of cities, towns and villages, however, the Bar has the benefit of no such publication. It is for lawyers so situated that "American Law and Lawyers" is principally intended.

The Syndicate above referred to has been in active operation for the past six years and is widely known to the Bar. Its editor, Mr. Rowland Shepard, a member of the Ohio Bar, has been engaged in legal publishing for the past 18 years and enjoys an extensive acquaintance with leaders in the profession and a thorough understanding of current professional problems. He is a member of the Ohio State Bar Association's committee on public relations. Last summer he was chosen to edit the official daily newspaper for the American Bar Association and more recently to handle publicity for the House of Delegates' mid-winter meeting.

Notice to Junior Bar Conference Members

(From the Chairman)

Make your hotel reservations for the San Francisco meeting as soon as possible. The World Fair that is in progress there will tax hotel accommodations particularly at the time of the annual meeting. The Empire Hotel will be the scene of the Junior Bar Conference's activities. Reservations should be made for this hotel through Mrs. Olive G. Ricker, Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.